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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 KATHRYN TOWNSEND GRIFFIN, *et*
4 *al.*,

Plaintiffs,

v.

17 Cv 5221 (LLS)

6 EDWARD CHRISTOPHER SHEERAN, personally
7 known as Ed Sheeran, *et al.*,

8 Defendants.

9 -----x

New York, N.Y.

May 2, 2023

11:11 a.m.

11 Before:

12 HON. LOUIS L. STANTON,

District Judge

14 - and a Jury -

15
16 APPEARANCES

17 FRANK & ASSOCIATES PC
18 BY: PATRICK RYAN FRANK
19 KEISHA RICE
KATHERINE VIKER

- and -

20 BEN CRUMP LAW
BY: BENJAMIN CRUMP
Attorneys for Plaintiffs

21 PRYOR CASHMAN LLP
22 Attorneys for Defendants
23 BY: ILENE SUSAN FARKAS
DONALD S. ZAKARIN
24 ANDREW MARK GOLDSMITH
BRIAN MAIDA

25 ALSO PRESENT:
KIM PASSEY, paralegal

N521GRI1

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1 (In open court; jury not present)

2 THE COURT: Good morning.

3 ALL COUNSEL: Good morning.

4 THE COURT: If you want to sit down, sit down.

5 (Jury present)

6 MS. FARKAS: The defense would like to continue with
7 the examination of Dr. Lawrence Ferrara.

8 THE COURT: Then where is he?

9 Good morning.

10 You're still under oath.

11 THE WITNESS: Thank you. Yes.

12 THE COURT: That does not affect the piano playing.

13 THE WITNESS: Thank you.

14 LAWRENCE FERRARA PhD, resumed.

15 DIRECT EXAMINATION CONTINUED

16 BY MS. FARKAS:

17 Q. Good morning, Dr. Ferrara.

18 A. Good morning.

19 Q. Directing your attention back to "Thinking Out Loud," did
20 you transcribe the composition embodied in the sound recording
21 of "Thinking Out Loud"?

22 A. Yes, I did.

23 Q. And can you explain what it means to transcribe the
24 composition that's embodied in the sound recording of "Thinking
25 Out Loud."

N521GRI1

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1 A. Yes. A transcription is putting into written notation the
2 music that's embodied in a sound recording. The process that I
3 use is to listen to the work in its entirety many times, but
4 then to zoom in to specific sections to start the transcription
5 process — that is, taking note by note and putting it into a
6 notational software — and in so doing, I put the audio into a
7 media player. There are several that are available. And what
8 it allows me to do is to loop various sections. So I can
9 literally loop a section that's three seconds or four seconds
10 or more. And a loop means to just automatically repeat it over
11 and over again. It allows me to get a sense of what I'm
12 hearing, then to really zoom in to begin to write out, via that
13 software, each note, each chord, each lyric.

14 And then with respect to chords and to melody, I can
15 also match at the piano, which is right next to my keyboard for
16 the computer, and so it's a really slow and systematic,
17 deliberate process, so that you get the transcription that
18 really does represent the composition embodied in the sound
19 recording.

20 Q. Thank you.

21 What elements of "Thinking Out Loud" did you
22 transcribe?

23 A. I transcribed both the music and the lyrics.

24 Q. And after you transcribed "Thinking Out Loud," did you
25 compare your transcription against the published sheet music

N521GRI1

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1 for "Thinking Out Loud"?

2 A. Yes, I did.

3 Q. And what did you find?

4 A. I found that my transcription of the vocal melody, the
5 melody that Ed Sheeran sings, was the same as the vocal melody
6 in the published sheet music. My transcription of the chord
7 symbols is the same as that in the published sheet music, and
8 my transcription of the lyrics were also the same as in the
9 published sheet music.

10 Q. And is what we're looking at here the published sheet music
11 for "Thinking Out Loud"?

12 A. Yes, it is.

13 Q. Overall, did your transcriptions differ at all from the
14 topline of the published sheet music?

15 A. There we go. So by the topline, we're talking about this
16 — literally, this top line, or musical staff, and on this
17 topline, we have the chord symbols on top, the vocal melody,
18 these notes that are in the staff, and then of course you can
19 see two verse lyrics — the first verse lyrics and the second
20 verse lyrics. This topline is consistent, exactly consistent,
21 with my transcription.

22 The bottom two lines are the piano arrangement, and
23 that is not what I transcribed. I transcribed the melody, the
24 harmony, which would be the chords, and the lyrics.

25 Q. And you mentioned the piano accompaniment in the bottom two

N521GRI1

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1 lines. Is that piano accompaniment in the recording of
2 "Thinking Out Loud"?

3 A. It is not. It is a piano arrangement.

4 Q. Apart from the materials that we've already discussed, did
5 you review any other materials in performing your analysis?

6 A. Yes. I reviewed many works that predate LGO or TOL, and I
7 also reviewed works of Ed Sheeran and of Amy —

8 Q. Wadge. It's —

9 A. Yes, I'm always considerate of pronouncing it correctly,
10 but it is Wadge, I believe.

11 Q. What are the component elements of music that you analyzed
12 in this case?

13 A. The fundamental elements of music are the structure, the
14 harmony, the melody, the rhythm, and the lyrics. There are
15 other elements that are not fundamental. For example, the key,
16 the meter, the overall genre, or style, those are not as
17 fundamental because they're essentially musical ideas and
18 musical building blocks that are commonplace, whereas the
19 actual expression in the melody and harmony and the lyrics, so
20 forth, would be considered much more fundamental.

21 Q. Are "Let's Get It On" and "Thinking Out Loud" written in
22 the same key?

23 A. No. "Thinking Out Loud" is written and recorded in the key
24 of D. LGO is record — is written in the key of E flat.
25 They're both major, so D major in TOL, E flat major in LGO.

N521GRI1

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1 Q. In assessing the two songs in this case, did you consider
2 key to be an important factor?

3 A. Key is not an important factor with respect to copying.
4 One needs to establish what key the work is in, but the point
5 is that whether a work is in E flat major or D major would not
6 be necessarily important in figuring out whether you think
7 there's evidence of copying.

8 Q. Let's discuss the other elements in the "Let's Get It On"
9 sheet music.

10 We're looking at Joint Exhibit 2 here. In addition to
11 key and meter, what other musical elements are included in the
12 "Let's Get It On" sheet music?

13 A. Melody, harmony, and lyrics.

14 Q. Anything else?

15 A. No.

16 Q. Can you please show us where we can find those elements in
17 the "Let's Get It On" deposit copy sheet music.

18 A. The harmony — and that is the chord symbols — as you can
19 see, are right above the staff: E flat, G minor, A flat, B flat
20 7. Beneath it is the melody, and that, once again, is
21 represented by the notes that are within the staff. And below
22 each staff are the lyrics.

23 Q. Is there a tempo notated in the deposit copy?

24 A. No, there is no tempo in the LGO deposit copy.

25 Q. And does "Thinking Out Loud" include a tempo?

N521GRI1

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1 A. Yes, the slide that we just saw, in fact, had a tempo
2 marking of 80 beats per minute.

3 Q. And in addition to tempo, are there other elements in
4 "Thinking Out Loud" that are not notated in the "Let's Get It
5 On" sheet music?

6 A. Yes.

7 Q. Does "Thinking Out Loud" include a bass part?

8 A. No, it does not.

9 Q. "Thinking Out Loud."

10 A. Oh, "Thinking Out Loud." I'm sorry. Yes, "Thinking Out
11 Loud" has a bass part.

12 Q. And what about "Let's Get It On," does that have a bass
13 part?

14 A. "Let's Get It On" does not have a bass part.

15 Q. And does "Thinking Out Loud" include drums?

16 A. Yes, it does.

17 Q. And does "Let's Get It On" notate drums?

18 A. No.

19 Q. Is it possible to notate a drum part on sheet music?

20 A. Yes, of course.

21 Q. So let's delve into the chord progressions at issue in this
22 case in some more detail.

23 What is the chord progression in "Let's Get It On"?

24 A. In "Let's Get It On," it's E flat. And if I don't say E
25 flat minor, it means it's E flat major. So E flat, G minor, A

N521GRI1

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1 flat, B flat 7.

2 Q. And what does that correspond to in Roman numerals?

3 A. In Roman numerals, it corresponds, as you can see, to an
4 upper case I for the E flat, a lower case iii for the G minor,
5 and upper case IV for the A flat, and an upper case V for the B
6 flat.

7 Q. And we have seen sometimes that the fourth chord on "Let's
8 Get It On" is notated with a 7 after it; is that correct?

9 A. That is correct. That is the way it's marked in the sheet
10 music.

11 Q. And can you explain the 7 next to the V chord.

12 A. Yes, the 7 after the — the V represents an added pitch.
13 Each of those chords that we just saw are triads. That is,
14 they're chords consisting of three notes, and the name of the
15 chord — for example, E flat — is the root and the lowest note
16 of the chord, the way these are marked. The exception is the
17 V7. That adds a fourth pitch, which is the interval of a
18 seventh above the root. That specific note is an A flat.

19 Q. Can you please play this chord progression on the piano.

20 A. Yes. Here is the chord progression. That's the first
21 chord. This is in E flat. One, two, three, four . . .
22 (playing piano). And that is just the chord progression. I'm
23 not playing it in any particular harmonic rhythm other than
24 making each chord even, each chord at two beats.

25 Q. What is the basic four-chord progression in "Let's Get It

N521GRI1

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1 On"?

2 A. In a basic chord progression, musicologists often try to
3 consolidate, remove, add pitches, so the basic chord
4 progression would be the same chord progression except taking
5 the 7 off of the V, and that would result in this (playing
6 piano). That doesn't erase the fact that the 7 is in the sheet
7 music. It is part of the composition. Each time this chord
8 progression is — is written, it always has the seventh on that
9 fourth chord of the four-chord progression, but once again, for
10 the purposes of analysis, we talk about a basic chord
11 progression and that's what it is.

12 Q. Let's move on to the chords in "Thinking Out Loud." What
13 are your findings regarding the chord progressions in "Thinking
14 Out Loud"?

15 A. The chord progression in "Thinking Out Loud" is different.
16 The fourth chord is different. But most important is that
17 there are multiple chord progressions in "Thinking Out Loud."

18 Q. What do you mean there are multiple chord progressions in
19 "Thinking Out Loud"?

20 A. Well, they can be divided in half. There are multiple
21 chord progressions that have some similarity to the chord
22 progression in "Let's Get It On," and then there are other
23 chord progressions that are significantly different from any
24 chord progression in "Let's Get It On."

25 Q. What are the chord progressions in "Thinking Out Loud" that

N521GRI1

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1 have some similarity to the chord progressions in "Let's Get It
2 On"?

3 A. Well, this is a slide that I understand Dr. Stewart showed.
4 This is my slide. And it is meant to show at least five —
5 there are more, but five of the similar chord progressions that
6 are in TOL, with LGO's chord progression on top.

7 So as you can see, at the topline, LGO, I, iii, IV, V,
8 VII. These are not the basic chord progressions; these are the
9 chord progressions as they're actually played.

10 So in TOL, I-V, without getting into the theory,
11 simply means that the third of the chord is missing. I/3 is
12 the one chord with the third of the bass, the IV is the IV
13 chord, as we expect, and the V has a different pitch. It's
14 basically a suspended II chord. Without getting any further
15 into it, essentially each one of these represents a chord
16 progression in TOL. And there are others, but there are
17 similarities, you can see, to the chord progression in "Let's
18 Get It On."

19 Q. Of the five "Thinking Out Loud" chord progressions in the
20 chart on the screen, which is the closest to the I-iii-IV-V
21 chord progression in "Let's Get It On"?

22 A. In TOL No. 4, one can readily see that the I would be the
23 same as — as the I in LGO; the I/3 of course is different as
24 compared to the iii; but then the IV and the V and, if we were
25 to go to the basic chord progression in LGO and drop the VII,

N521GRI1

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1 then it would be very close.

2 Q. And is there another name that you would use to refer to
3 this TOL No. 4?

4 A. Yes. I'm referring to this as the basic chord progression
5 in TOL that is at issue.

6 Q. And when you say basic chord progression, can you explain
7 what — again, what you mean by that.

8 A. Yes. As per my explanation a moment ago, each of these
9 chords consists of three pitches, and so there are no added
10 chords, no added pitches.

11 Q. And does the slide that we're looking at include all of the
12 different chord progressions that appear in "Thinking Out
13 Loud"?

14 A. No, it doesn't include any of those different chord
15 progressions.

16 Q. Lastly, regarding the chord progression at issue, is the
17 LGO chord progression the same as the TOL chord progression?

18 A. No. As you can see, none of these similar chord
19 progressions are the same. The closest would be TOL No. 4.

20 Q. Could you please play for us the LGO chord progression
21 followed by the TOL chord progression at the piano, please.

22 A. Yes. Once again, without any harmonic rhythm, just playing
23 the chords, and so that we can hear them in the same key, I'm
24 going to start with LGO in the key of D major and then do the
25 TOL, also in the key of d major.

N521GRI1

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1 So this is LGO: (playing piano). And now here is TOL:
2 (playing piano). Those are the basic chord progressions in
3 both.

4 Q. You mentioned prior art before, briefly. Could you explain
5 what a prior art search is.

6 A. Yes. In doing a prior art search, you look for literally
7 works that predate one or both of the songs at issue, and in
8 this case, that would be 1973 for "Let's Get It On" and 2014
9 for TOL. And given the similarities that are at issue, you
10 look to earlier works that embody those similarities that are
11 at issue.

12 Q. And as a general matter, how do you perform a prior art
13 search when you're dealing with chord progressions?

14 A. I have a library of method books, of sheet music and books
15 and so forth. There are online indices. And so I look through
16 those in order to find, locate, identify, and then ultimately
17 do the analysis of prior art.

18 Q. In connection with this case did you conduct a prior art
19 search for songs that use the same basic chord progressions in
20 "Let's Get It On" and "Thinking Out Loud"?

21 A. Yes, I did complete a prior art search with respect to the
22 basic chord progressions in both works.

23 Q. And how did you conduct that search?

24 A. Essentially the same way I just described a moment ago.

25 Q. How many songs did you review in performing your search?

N521GRI1

Ferrara - Direct

1 A. Several hundred.

2 Q. And when you found a song that used the same basic chord
3 progressions in "Thinking Out Loud" or "Let's Get It On," did
4 you do anything to record your findings?

5 A. I created a list of those songs that embody either the TOL
6 or the LGO basic chord progression.

7 Q. And at the end of your search, how many songs did you find
8 that used the same basic chord progressions in "Let's Get It
9 On" or "Thinking Out Loud"?

10 A. 101 songs.

11 Q. I'd like to show you what's been marked for identification
12 as Defendant's Exhibit 210.

13 Do you recognize this document?

14 A. Yes, I do.

15 Q. And what is this document?

16 A. This is the list of the 101 prior art works.

17 Q. And does this document accurately reflect the names of the
18 101 songs that you found that use the same basic chord
19 progressions in "Let's Get It On" and "Thinking Out Loud"?

20 A. Yes, it does.

21 MS. FARKAS: Your Honor, I'd like to move Exhibit 210
22 into evidence.

23 MR. FRANK: We would object, your Honor, based on
24 hearsay. It's an expert report. The best evidence is
25 Dr. Ferrara's testimony. I would also note that Dr. Stewart's

N521GRI1

Ferrara - Direct

1 report elements were left out based on the same basis.

2 MS. FARKAS: Your Honor, the plaintiff's motion in
3 *limine* on this evidence was already denied. And it's not
4 hearsay. It's just a list of Dr. Ferrara's findings. He can
5 — he's already testified that he conducted a search and
6 created a list.

7 THE COURT: Received.

8 (Defendant's Exhibit 210 received in evidence)

9 BY MS. FARKAS:

10 Q. How many songs did you find that use the same basic chord
11 progression in "Let's Get It On"?

12 A. 80.

13 Q. And how many of those songs were created before "Let's Get
14 It On"?

15 A. 33.

16 Q. How many songs did you find that used the same basic chord
17 progression in "Thinking Out Loud"?

18 A. 21.

19 Q. And how many of those were created before "Let's Get It
20 On"?

21 A. Four.

22 Q. And as between the basic chord progression in "Let's Get It
23 On" and the basic chord progression in "Thinking Out Loud,"
24 which one did you find to be more common?

25 A. The basic chord progression in "Let's Get It On" is far

N521GRI1

Ferrara - Direct

1 more common than the basic chord progression in TOL.

2 Q. But would your opinion be that "Thinking Out Loud" chord
3 progression is also considered common?

4 A. Yes, it is.

5 Q. What significance, if any, do you find in the fact that 80
6 songs out of the several hundred that you reviewed have the
7 same chord progression that is in "Let's Get It On"?

8 A. When there are so many works that have an element that's at
9 issue in common, it makes much less likely the copying by the
10 writers of TOL of any one of those particular 80 songs, let
11 alone "Let's Get It On."

12 Q. And how, if at all, does that inform your opinion as to
13 whether the authors of "Thinking Out Loud" copied from "Let's
14 Get It On"?

15 A. Once again, it supports my finding that there is no
16 musicological evidence of copying. And it establishes, once
17 again, two things: one, the commonplace status of the chord
18 progression — indeed, the chord progression would be
19 considered a musical building block, and that once again cuts
20 against the idea of copying; and secondly, that it's clear that
21 "Let's Get It On" was not nearly the first to use this chord
22 progression; there are at least 33 songs that predate it that
23 used the same chord progression.

24 Q. And to be clear, do you believe that the 80 songs that you
25 identified that use the basic "Let's Get It On" chord

N521GRI1

Ferrara - Direct

1 progression are the only songs in history that were authored
2 before "Thinking Out Loud" that used this basic chord
3 progression?

4 A. No. I'm confident that if I spent more time on a prior art
5 search, I would find additional works.

6 Q. Dr. Ferrara, I'd like you to look at what's been marked for
7 identification as Defendant's Exhibit 201.

8 Do you recognize this document?

9 A. Yes. This is — the first page is the cover, the book
10 cover, of a book called *Money Chords*, subtitled *A Songwriter's*
11 *Sourcebook of Popular Chord Progressions*.

12 MS. FARKAS: Your Honor, I'd like to move Exhibit 201
13 into evidence.

14 MR. FRANK: Objection, your Honor; hearsay, relevance.

15 MS. FARKAS: Your Honor, we're not offering it for the
16 truth of what's in the book; we're simply offering it to show
17 that the LGO chord progression is taught in beginner guitar and
18 piano books.

19 THE COURT: Received.

20 (Defendant's Exhibit 201 received in evidence)

21 BY MS. FARKAS:

22 Q. Dr. Ferrara, what's the significance of Exhibit 201?

23 A. If we go to the third page that's within the book, you can
24 see at the bottom of the page, page 57, and at the top, it has
25 what's called a rock ballad chord progression. And that arrow

N521GRI1

Ferrara - Direct

1 is my arrow. It's my handwritten arrow so that I could make it
2 easier for you to see it. And you can see that the description
3 is the most frequent progressions that begin with the E chord
4 and then move to the G sharp chord. And so this E, G sharp
5 minor, Ab7 chord progression is the identical — not the basic
6 chord progression but the identical chord progression in "Let's
7 Get It On." It just happens to be based on the key of E, not
8 based on the key of E flat.

9 In addition, in the preface of this book, the author
10 notes that chord progressions are "basic building blocks," as I
11 called them as well. So this would be one of those basic
12 building blocks that the author is pointing to.

13 And in the appendix of the book, the author names the
14 — what the author thinks is the 80 most popular chord
15 progressions, and needless to say, there are many more, and
16 includes the chord progression that's at issue in LGO as one of
17 those popular chord progressions.

18 Q. If you could please take a look at what's been marked for
19 identification as Defendant's Exhibit 202.

20 And if you could tell us if you recognize this
21 document.

22 A. Yes. This is the book cover, and then inside the book is a
23 repeated book cover, bibliographic page, and then some other
24 pages from a book for advanced beginners that are on a guitar
25 method.

N521GRI1

Ferrara - Direct

1 MS. FARKAS: Your Honor, we'd like to move Exhibit 202
2 into evidence.

3 MR. FRANK: No objection, your Honor.

4 THE COURT: Received.

5 (Defendant's Exhibit 202 received in evidence)

6 Q. What is the significance of Exhibit 202, Dr. Ferrara?

7 A. Well, the significance can be seen within the contents of
8 the book. And just by way of example, if we could go to the
9 third page, or — one more.

10 Thank you.

11 So this, you can see at the bottom of the page, is
12 page 75, and I've once again put a handwritten arrow there to
13 point to the specific chord progression at issue. You can see
14 that above that chord progression, there are other songs that
15 use it. It shows up in songs — I'm reading — like "I Do" by
16 Jude, "If I Had a Hammer" by Pete Seeger, "Cruel To Be Kind,"
17 and so forth, "True Love Ways" by Buddy Holly, and the rest.
18 And that chord progression once again is identical. In fact,
19 now you not only have the chords, in this case written in the
20 key of G, but you have the Roman numerals, and as you can see,
21 they're identical to the chord progression in "Let's Get It
22 On;" not the basic chord progression, but the chord progression
23 as written in the deposit copy. So it even includes the V7.
24 I, iii, IV, V7.

25 And if we go to the very next page, we have another

N521GRI1

Ferrara - Direct

1 chord progression at the bottom, and I have that — once again,
2 put an arrow. This is in the key of A. A, C sharp minor, D,
3 E7, and the Roman numerals are exactly the same as before —
4 that is, upper case I, lower case iii, upper case IV, upper
5 case V, with the 7. So once again, in another category —
6 Class 8 songs is what this writer is calling them — in another
7 category, this very same, this identical, chord progression
8 from LGO deposit copy is here as one of those chord
9 progressions for guitar students to learn.

10 Q. And does this book make any mention of "Let's Get It On"?

11 A. Yes, it does. If you look at the last page, right above my
12 arrow, in the right column. By the way, even though "Let's Get
13 It On" was recorded in 1973, which is after dozens of other
14 I-iii-IV-V chords were recorded, I firmly believe that Marvin
15 Gaye did not plagiarize the song; he was simply writing a song
16 using a common progression, just like every other professional
17 songwriter does.

18 Q. Do you agree with the opinion of the author?

19 A. Of the author's writing? Yes, I agree with it 100 percent.
20 Clearly, by the time that "Let's Get It On" was written, that
21 chord progression was common. And that is, I've already
22 proffered 33 songs that predated that use the same basic chord
23 progression. And so I do agree with it. And I also agree that
24 given the commonplace nature, that there's no reason that one
25 would think that the writers of LGO copied any one of those

N521GRI1

Ferrara - Direct

1 songs that predated it.

2 Q. Can you please take a look at what has been marked for
3 identification as Defendant's Exhibit 203.

4 A. Yes.

5 Q. Do you recognize this document?

6 A. I do. This is another music method book. This happens to
7 be a piano method — not a guitar method, a piano method book,
8 and you should see, it says, "How to Play Rock 'N' Roll Piano."
9 And if we go to the next page —

10 Q. Hold on, Dr. Ferrara. I think —

11 A. I'm sorry. You've got to admit it. I'm sorry. Thank you.

12 MS. FARKAS: I'd like to move Exhibit 203 into
13 evidence, please.

14 MR. FRANK: No objection, your Honor.

15 THE COURT: Received.

16 (Defendant's Exhibit 203 received in evidence)

17 Q. What is the significance of Exhibit 203?

18 A. We can once again go into the book. The next page, you can
19 see, is music. It happens to be page 84 in the book. And the
20 heading is Ten Popular Rock 'N' Roll Progressions.

21 I should add that this book was published in 1967 —
22 that is, six years before the creation of "Let's Get It On."
23 So this is a 1967 publication, and it lists Ten Popular Rock
24 'N' Roll Progressions. And as you can see, once again, just to
25 facilitate, I put an arrow in at No. 4, and that is the C, E

N521GRI1

Ferrara - Direct

1 minor, F, G chord that is the basic chord progression that is
2 in LGO.

3 Q. Dr. Ferrara, have you reviewed the transcript of
4 Dr. Stewart's trial testimony?

5 A. Yes.

6 Q. And did you also review the PowerPoint slides that he used
7 to demonstrate his testimony?

8 A. Yes, I did.

9 Q. I'd like to direct your attention to Dr. Stewart's
10 testimony regarding the first 24 seconds of "Thinking Out Loud"
11 compared to the rest of "Thinking Out Loud."

12 Setting aside for a moment the first 24 seconds, are
13 you and Dr. Stewart in agreement as to the basic chord
14 progression in "Thinking Out Loud" after the 24-second mark?

15 A. Yes. It is my understanding and having read his report and
16 — that he and I both believe that certainly after 24 seconds,
17 the second chord in TOL is consistently the I/3 chord, not the
18 lower case iii chord that is in LGO.

19 Q. Dr. Stewart testified that the second chord of "Thinking
20 Out Loud" during the first 24 seconds of "Thinking Out Loud" is
21 an F sharp minor or the iii chord as in "Let's Get It On." Do
22 you agree with Dr. Stewart?

23 A. No. I disagree. I believe that Dr. Stewart is wrong.

24 Q. Now what is your basis for saying that the second chord in
25 "Thinking Out Loud" is a D/F sharp major and not the F sharp

N521GRI1

Ferrara - Direct

1 minor?

2 A. The basis of doing the transcription that I described
3 earlier, and, in addition, to considering the vocal melody that
4 is being sung with that harmony.

5 Q. And is the published sheet music for "Thinking Out Loud"
6 consistent with your transcription and analysis?

7 A. Yes, the published sheet music, right from the get-go and
8 through the song, wherever that chord progression at issue
9 occurs, has it listed as a, as you can see, a — thank you — a
10 D/F sharp, which would be a I/3 in Roman numerals.

11 Q. Has Dr. Stewart been consistent on this point?

12 A. No, he hasn't.

13 Q. Can you please explain.

14 A. Yes. This is example 3 from Dr. Stewart's report. This is
15 Dr. Stewart's example 3. And as you can see, looking at TOL,
16 first we have a time stamp, so he is saying this is at the
17 beginning of TOL — i.e., in the first 24 seconds. And as you
18 can see, the second chord that Dr. Stewart has written is a D/F
19 sharp chord. You can see the F sharp minor chord in LGO, and
20 here in this report, Dr. Stewart concedes that the second chord
21 in TOL is D/F sharp.

22 Q. As an example of the use of these two chords, could you
23 please play the portion of the vocal melody in "Thinking Out
24 Loud" that is sung with the second chord, first as a D/F sharp
25 chord and then as an F sharp minor chord.

N521GRI1

Ferrara - Direct

1 A. Yes. And so here is the first — just the melody, so, of
2 "Thinking Out Loud" that plays with the D/F sharp chord:
3 (playing piano).

4 Okay. We have power. (Playing piano.)

5 This is Dr. Stewart's transcription, and he adds a
6 grace note. Would you like me to play it with the grace note
7 or as per the published sheet music, which doesn't have the
8 grace note? That's the only difference.

9 Q. As the published sheet music, please.

10 A. Okay. So without the grace note: (playing piano). I
11 stopped there because that is where the melody with the D/F
12 sharp chord occurs. And the words are "When your legs don't
13 work like they." (Playing piano)

14 Okay. Now I play it with the chord. This is with the
15 D/F sharp chord. (Playing piano)

16 And I just note that that very last note is a D
17 (playing), and it essentially matches the highest note in the
18 D/F sharp chord (playing). That's the D/F sharp chord
19 (playing). That highest note is also the last note of the
20 melody, so . . . (playing).

21 Now I do the same thing but using the F sharp minor
22 chord.

23 (Playing). Play it a little louder (playing). And
24 think about that last note once again. It was so harmonious
25 with the D (playing) that now with the F sharp minor (playing),

N521GRI1

Ferrara - Direct

1 it clashes. That doesn't mean that it couldn't be written by a
2 composer, but the point is that when you play the two together,
3 you recognize that the buoyancy and the kind of message that
4 the opening of TOL gives is much more in line with D major,
5 which, again, continues throughout the rest of the song, and
6 not the F sharp minor chord.

7 Q. Now let's assume for the sake of argument that the second
8 chord in both songs was the same. Would you find that
9 significant?

10 A. It would not be significant. This is an important point.
11 What if the chord progression in TOL that's at issue was not
12 the I/3 but the iii? That is, what if TOL, in those parts of
13 the song that have a chord progression at issue, had the same
14 chord progression as "Let's Get It On," the I-iii-IV-V? It
15 would not be significant. And the reason is that it is a
16 musical building block. It's been used — in fact it was used
17 in 80 songs, prior to TOL. The LGO basic chord progression was
18 used in 80 songs prior to the writers of TOL writing TOL. And
19 therefore, it would not be significant.

20 Q. Yesterday plaintiff's counsel asked Mr. Sheeran a line of
21 questioning that suggested to Mr. Sheeran that he was wrong
22 about the second chord in the "Thinking Out Loud" chord
23 progression during the first 24 seconds of "Thinking Out Loud."
24 and plaintiff's counsel also suggested that in your report that
25 you also disagreed with Mr. Sheeran about this second chord

N521GRI1

Ferrara - Direct

1 during the first 24 seconds. Do you have a reaction to that?

2 A. Yes. I was informed of this yesterday. I was not in the
3 courtroom, but I was informed of this. And so last night, when
4 I got home, I reviewed my report, and I didn't find any
5 sentence that at all suggested that the second chord in
6 "Thinking Out Loud" — and the chord progression at issue is F
7 sharp minor. I found that I'm consistent throughout that
8 report. And so on that basis, Ed Sheeran and I are in
9 agreement on what that second chord is.

10 Q. Setting aside the basic chord progression in "Thinking Out
11 Loud," are there other chord progressions in "Thinking Out
12 Loud" that are more different from the basic chord progression
13 in "Let's Get It On"?

14 A. Yes, there are.

15 Q. And in what sections of "Thinking Out Loud" do those
16 different chord progressions appear?

17 A. The first section is in the pre-chorus sections. The chord
18 progression there is quite different from anything in LGO and
19 certainly not at issue. And then in the last two bars, bars 9
20 and 10 of each repeating chorus, there is a descending chord
21 progression that's quite different from anything at issue. If
22 I may, I'll play it. Yes? Okay. So here it is. This is —
23 these are the last two bars of the chorus in TOL. And it's a
24 descending chord progression. You'll hear it moving down step
25 by step (playing piano).

N521GRI1

Ferrara - Direct

1 Once again (playing). Now not only is there nothing
2 remotely like that in "Let's Get It On," as I'll point out
3 later, there are songs — and particularly one song, "Crazy
4 Love" by Van Morrison, which was released three years before
5 the creation of LGO — that has a very similar chord
6 progression.

7 Q. I'd like to just briefly play 30 seconds from "Thinking Out
8 Loud" to confirm with you that that's the section that you've
9 been just speaking about.

10 MS. FARKAS: So if we can play the chorus of "Thinking
11 Out Loud" starting at 1:11 to about 1:42.

12 (Audio playing)

13 A. You're hearing the I/3, IV, V chord progression here. This
14 is the — you'll hear three iterations of it. If we could
15 start that again.

16 (Audio playing)

17 A. This is the chord progression at issue.

18 (Audio playing)

19 Q. So can you just explain to us briefly what we just heard.

20 A. Yes. And so once again, we heard three iterations of the
21 basic chord progression at issue (playing piano). And now
22 since we heard them with anticipation, I should play it that
23 way. So we heard (playing). We hear that three times and then
24 followed by bars 9 and 10, or measures 9 and 10, and we heard
25 that descending (playing).

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Ferrara - Direct

1 Q. Let's discuss the harmonic rhythm in more detail. What is
2 harmonic rhythm?

3 A. Harmonic rhythm is the rate of change of chords, rate or
4 pace of change of chords.

5 Q. Is the harmonic rhythm in "Let's Get It On" the same as the
6 harmonic rhythm in "Thinking Out Loud"?

7 A. It is not.

8 Q. Dr. Stewart testified that when the tempo of "Let's Get It
9 On" is adjusted, the harmonic rhythm is identical to "Thinking
10 Out Loud." Do you agree with him?

11 A. No. Following the *Harvard Dictionary of Music* definition
12 of "harmonic rhythm," you'll see in the beginning of the second
13 paragraph, harmonic rhythm does not itself depend on tempo, in
14 fact, any more than melodic rhythm does. So whether you play a
15 song fast or slow, the relationships in the duration of those
16 chords remain. If a chord is held for three beats and then it
17 changes, it's still three beats and a change, whether you play
18 it fast or whether you play it slow. And that's what that
19 means in the *Harvard Dictionary of Music*.

20 Q. And is there even a tempo notated in the deposit copy of
21 "Let's Get It On"?

22 A. No, of course not. As I mentioned earlier, there is no
23 tempo marked in the LGO deposit copy.

24 Q. Let's discuss the alleged similarity with respect to
25 harmonic rhythm.

N521GRI1

Ferrara - Direct

1 What has Dr. Stewart claimed is similar?

2 A. In addition to the chord progression, he finds that both —
3 and this is correct — that both chord progressions feature
4 anticipation, where the chord comes in ahead of the beat, and
5 specifically, the anticipation of the second and the fourth
6 chord in each of the chord progressions.

7 Q. Is it possible to perform a chord progression without
8 harmonic rhythm?

9 A. No. As soon as the chord progression is performed or if it
10 is written over a staff and there's actually beats, then the
11 chord progression includes the harmonic rhythm.

12 Q. Can you please play for us the chords of "Thinking Out
13 Loud" at issue with anticipation and then play it without
14 anticipation and then please repeat that.

15 A. Okay. So here is with anticipation. Two, three, four
16 (playing). Without: (playing).

17 Q. Can you repeat that, please.

18 A. Yes, I'll do it again. Here is with anticipation. Two,
19 three, four (playing). Without: (playing).

20 Q. And what is your understanding of Dr. Stewart's opinion
21 regarding the significance of anticipation in this case?

22 A. It's a linchpin for Dr. Stewart's finding that this
23 combination is significant. Once again, the chord progressions
24 are not the same, but they are — the anticipation on the
25 second and fourth is. The problem with that opinion is

N521GRI1

Ferrara - Direct

1 twofold:

2 First, anticipation in and of itself. Anticipation is
3 a centuries-old device. It is a musical building block.

4 And secondly, the fact that it happens to be used in a
5 second and fourth chord of a four-chord progression is also
6 common, and indeed, as I'll show later, there are even some
7 songs that predate "Let's Get It On" that have that chord
8 progression with that harmonic rhythm.

9 Q. And do you recall what Dr. Stewart said at his deposition
10 about, you know, if there were no anticipation in this case?

11 A. I attended Dr. Stewart's deposition years ago, by
12 telephone, so I listened in, and certainly had a transcript of
13 his deposition, and it is my recollection — and it certainly
14 has come up since — that Dr. Stewart conceded that the chord
15 progression in and of itself was commonplace.

16 Q. And do you recall that he admitted that without
17 anticipation, the similar chord progression would not suggest
18 copying?

19 MR. FRANK: Objection, your Honor. He can't testify
20 as to what Dr. Stewart said in his deposition. That's hearsay.
21 If they want to put up Dr. Stewart's deposition, they can
22 certainly do that. But this is completely inappropriate to
23 elicit testimony from this witness about what another expert
24 said.

25 MS. FARKAS: He's responding to their expert's

N521GRI1

Ferrara - Direct

1 testimony about — and concessions about what's at issue in
2 this case and what's not.

3 THE COURT: Not offered for the truth. It's offered
4 for the fact there were utterances by the other speaker.
5 Overruled.

6 A. Could you repeat the question.

7 Q. I'll try.

8 Do you recall that at Dr. Stewart's deposition he
9 admitted that without anticipation, the similar chord
10 progressions at issue would not suggest copying?

11 A. Yes.

12 Q. I'd like you to take a look at what's been marked for
13 identification as Defendant's Exhibit 204.

14 Do you recognize this document?

15 A. I do. The first page is the book cover of a method book
16 for guitarists, chord progressions, chord progressions for
17 guitarists, and that is followed by three pages of contents
18 from the book.

19 MS. FARKAS: I'd like to move Exhibit 204 into
20 evidence.

21 MR. FRANK: No objection, your Honor.

22 THE COURT: Received.

23 (Defendant's Exhibit 204 received in evidence)

24 Q. Generally speaking, what is being taught in these excerpts
25 from the guitar method book?

N521GRI1

Ferrara - Direct

1 A. In Chapter 1, you can actually see it in the text at the
2 top, it says a 2-bar strumming pattern. Strumming is the strum
3 pattern of the guitarist. That anticipates the chord changes
4 in measures 2, 4, 6, 8. So this is essentially teaching
5 anticipation to guitar students.

6 Q. And are there other examples in this book that you'd like
7 to point out?

8 A. Yes. So if you look at example 5, the first chord is on
9 the beat, which is like the chord progression in LGO; the
10 second chord anticipates — that is, comes right before — the
11 next bar, like LGO; the third chord is on the beat; and once
12 again, the fourth chord anticipates the next bar. So
13 essentially this is showing, not using the same chords — these
14 are not the chords in LGO, but these are showing anticipation
15 of not just chords but of the second and the fourth chords.

16 On the next page in the slide, which is page 17, we
17 have to go — let's see. Yes. Go down to 27. That's the
18 example in the middle. And you can see that it's the same —
19 that is, the A7 chord is on the beat; the E minor chord
20 anticipates the downbeat; the third chord A7 is on the beat.
21 And so once again, it's showing anticipation in the second and
22 fourth chords. And once again, this is not the chord
23 progression at issue; this is just showing anticipation of
24 second and fourth chords.

25 Q. And is there another example you'd like to just walk us

N521GRI1

Ferrara - Direct

1 through?

2 A. Yes. And this is 98. Here, we see the first chord on the
3 beat. This is like TOL. So the second chord anticipates the
4 third beat of the first bar, not the next bar, which is what we
5 have in LGO; but the second chord once again is anticipated;
6 the third chord is on the beat; the fourth chord is
7 anticipated. Once again, this simply shows anticipation of the
8 second and fourth chords, in this case in a guitar method book.

9 Q. And what is the significance of this being — of these
10 examples of anticipation being in this guitar method book?

11 A. It underlines the commonplace nature of something that any
12 musicologist knows, and that is that anticipation is centuries
13 old, it's a musical building block, and indeed it is
14 commonplace in popular music, not only to use it but to use it
15 specifically with respect to the second and fourth chords.

16 Q. I'd like you to take a look at what's been marked for
17 identification as Defendant's Exhibit 212.

18 Do you recognize this document?

19 A. Yes, I do.

20 Q. And what is this document?

21 A. This is published sheet music of songs — that in some
22 cases predate LGO, in others postdate — that I have selected
23 because they, once again, have a chord progression that has
24 anticipation of the second and fourth chords.

25 MS. FARKAS: We'd like to move Exhibit 212 into

N521GRI1

Ferrara - Direct

1 evidence.

2 MR. FRANK: No objection, your Honor.

3 THE COURT: Received.

4 (Defendant's Exhibit 212 received in evidence)

5 Q. What songs are included in Defendant's 212?

6 A. "People Get Ready," and that was released in 1964 by Curtis
7 Mayfield.

8 If we could move through.

9 "Lo and Behold," that was released by James Taylor in
10 1970.

11 So both of these first two predate LGO. We can move
12 again.

13 "Billie Jean," which most of you probably know, by
14 Michael Jackson. That was released in 1983. That would be
15 post-LGO but many years before TOL.

16 And next, "Learning to Fly" by Tom Petty. And that
17 was released in 1991. That, once again, is post-LGO but many
18 years before TOL.

19 And finally, "Should've Been a Cowboy." And that was
20 released in I think 1993. It's rather small. And that's by
21 Toby Keith.

22 Q. Now I thought you had said that anticipation was common.
23 Why are we only looking at five songs in this exhibit?

24 A. This is illustrative. This is just a small sample of what
25 could have been many, many songs that use, once again, a —

N521GRI1

Ferrara - Direct

1 have a four-chord progression in which the second and fourth
2 chords are anticipated. None of these five songs have the
3 chord progression at issue.

4 Q. Could you briefly demonstrate "People Get Ready" on the
5 piano for the jury, please.

6 A. Yes. The chord progression in "People Get Ready" is this.
7 So one, two, three, four . . . (playing). So I put the melody
8 now in the introduction. I think you'll recognize it. It
9 actually is recorded this way (playing). So what you just
10 heard was the first chord on the beat (playing), the second
11 chord anticipated (playing), third chord on the beat (playing),
12 the fourth chord anticipated (playing). So, (playing).

13 And let's just think about, for the moment, what we're
14 talking about. In the examples that I gave in the — in the
15 method book, but particularly here, we're talking about this:
16 Two, three, four . . . (clapping). That's it. (Clapping)
17 That's all there is. That's the anticipation. That is the
18 harmonic rhythm.

19 Q. The second song, "Lo and Behold," when was that released in
20 relation to "Let's Get It On"?

21 A. Okay. So once again, I'll play with the introduction.
22 This continues, as it does in the previous song, into the
23 verse. But here's the introduction. It's in the key of C. So
24 (playing). What we just heard was one, two, three, four, one,
25 two, three, four (playing), (clapping). That's it. That's the

N521GRI1

Ferrara - Direct

1 anticipation that's at issue.

2 Q. And do you know when that song was released as compared to
3 "Let's Get It On"?

4 A. Yes. Three years prior to "Let's Get It On," by James
5 Taylor.

6 Q. Let's do one more. When was "Learning to Fly" released?

7 A. Okay. "Learning to Fly," here's the intro. And actually,
8 you can hear that clapped rhythm I just played because those
9 are the notes. So, one, two, three, four (playing). And that
10 chord progression continues with the vocal, as in the others,
11 when the vocal comes in, "Well, I started out down a dirty
12 road" (playing). So the continuation, that is the anticipation
13 that's at issue.

14 Q. And was that song released before "Thinking Out Loud"?

15 A. This was released before "Thinking Out Loud." I can see it
16 more clearly here. 1991.

17 Q. Have you found examples of songs that feature the
18 anticipated second and fourth chords that also use the same
19 chord progressions that are at issue in this case?

20 A. Yes, I did.

21 Q. I'd like to direct your attention to the testimony of Ed
22 Sheeran using anticipation in prior songs. What specifically
23 did you find?

24 A. I'm sorry. What song?

25 Q. About Ed Sheeran using anticipation in prior songs.

N521GRI1

Ferrara - Direct

1 A. Oh, in prior songs. I'm sorry. I reviewed songs that Ed
2 Sheeran either wrote or co-wrote, and in all cases recorded,
3 prior to TOL. In fact, the years, as I recall, was between
4 2005 and 2013, and what I discovered — or even 2012 — what I
5 discovered was 20 songs of — that are part of Ed Sheeran's
6 repertoire, that he co-wrote or wrote, that include
7 anticipation. And notably, of those 20 songs that include
8 anticipation, 10 of them have anticipation of the second and
9 the fourth chords.

10 Q. And can you explain how you made those findings.

11 A. Yes. Once again, I went through sheet music and audio
12 particularly of the Ed Sheeran songs, and using the same
13 methodology that I mentioned before — it's slow and
14 deliberate, I made certain that I was accurate in the analysis
15 — and in so doing, I discovered that at least 10 of his songs
16 prior to TOL include this second and fourth anticipation
17 harmonic rhythm.

18 Q. And when you were reviewing Ed Sheeran's prior songs and
19 you found a song that used anticipation, did you record or
20 write down your findings?

21 A. Yes, I did. I created a list.

22 Q. Can you please take a look at what's been marked for
23 identification as Defendant's Exhibit 214.

24 A. Yes. That is the list that I created of the 20 songs, and
25 as you can see, some of the songs have —

N521GRI1

Ferrara - Direct

1 Q. Hold on. Sorry.

2 A. Oh, I'm sorry, once again.

3 Q. Got to do it the right way.

4 MS. FARKAS: I'd like to move Exhibit 214 into
5 evidence.

6 MR. FRANK: No objection, your Honor.

7 THE COURT: Received.

8 (Defendant's Exhibit 214 received in evidence)

9 Q. Proceed.

10 A. Okay. I jumped the gun again. All right.

11 As you can see, what this includes, in the
12 parentheticals — there are ten of them. Starting with the
13 first one, "I Love You," the second and the fourth chord are
14 anticipated, and so if you — as you scroll down, you'll see
15 this occurs, parentheses, in 10 of the 20 songs.

16 Q. And from a musicological perspective, what is the
17 significance, if any, of Mr. Sheeran's use of anticipation in
18 his prior songs?

19 A. Well, first, anticipation itself is clearly part of the
20 vocabulary, an important part of the vocabulary of Ed Sheeran;
21 and in addition to that, anticipating the second and fourth
22 chords as well as anticipation of chords in and of themselves
23 is part of his toolbox. It is part of his repertoire. It's
24 what he does, and he did frequently prior to TOL.

25 Q. So would it be safe to say that you find this list of songs

N521GRI1

Ferrara - Direct

1 significant?

2 A. Yes, this would be very significant, because once again, it
3 underlines the fact that what Ed Sheeran wrote and created in
4 TOL was growing out of the corpus of his works that predated
5 that.

6 Q. Dr. Ferrara, is the harmonic rhythm in "Let's Get It On"
7 and "Thinking Out Loud" the same?

8 A. No, it is not.

9 Q. Would you like — we're going to go through a slide that
10 will hopefully help you illustrate it for the jury. I direct
11 your attention to the screen.

12 Can you tell us what we're looking at, Dr. Ferrara.

13 A. Yes. These are charts that I created to show the harmonic
14 rhythm in LGO, which is here — and I'll explain it in a moment
15 — and TOL, which is here. I did the same — for anyone who
16 didn't want to see it over musical staves, I did it with boxes.
17 So these bottom two boxes merely replicate the staves on top.

18 And so if we stay with the staves on top, you can see
19 that in LGO, there is a I chord. That's the one chord we
20 already know about. These markings are rests, just to say that
21 we're not putting any vocal melody here, we're just talking
22 about the chords. And those rests allow us to calibrate the
23 number of beats that each of these chords has as a duration.
24 So the first chord, the I chord, has three beats. Duration is
25 three beats. The iii chord comes in on the fourth beat of the

N521GRI1

Ferrara - Direct

1 bar. Call it the measure; it's the same.

2 And after the bar line, we have the second measure.

3 And what's important to note is that this iii chord continues.

4 It doesn't just play for this one beat, the fourth beat of the
5 first bar; it continues all the way through the next bar, until
6 the next chord change. That iii chord is five beats.

7 Then the IV chord comes in for three beats, then the V
8 chord comes in. Just like the iii chord, it starts at the end
9 of the third bar and continues in the fourth bar for five
10 beats.

11 You can see that they don't line up, and the reason
12 they don't is that in TOL, the first chord is one and a half
13 beats, not three; the second chord is two and a half beats, not
14 five; and so forth with IV and V.

15 And there's a very important point here. Dr. Stewart
16 cuts in half the value of the chords in the harmonic
17 progression. He cuts them in half. And later I'll show you
18 that that can be done. It could be done to facilitate a
19 comparative analysis. But what's important here is that this
20 is what's in the deposit copy. We cannot say that this chord
21 progression or the harmonic rhythm in TOL is the same as LGO.
22 It is not. You can see that it is not. This is an important
23 point with respect to key. Because I've already testified that
24 the two songs are in different keys. One's E flat, one's D.
25 But to facilitate the comparison, we put them both in D. But

N521GRI1

Ferrara - Direct

1 we never say, and therefore, "Let's Get It On" is in the key of
2 D. We always say, with the qualification, we're transposing it
3 to D, but by the way, it is in the key of E flat. So even if
4 you transpose, it doesn't make the two songs in the same key.
5 That's just a facilitation of the analysis. It is exactly the
6 same here. Yes, a musicologist — and I do this later with
7 prior art — will cut that note value and chord value in half.
8 We do that so that things line up. But the key is, you can't
9 then come back and say, oh, now they're the same. You can't
10 now come back, after you halved the chord progressions, and say
11 they're the same. That would be like saying, oh, since I
12 transposed, well, "Let's Get It On" into the key of D, now it's
13 in the key of D, it isn't in the key of E flat. Well, no, the
14 deposit copy is in the key of E flat, and it's different. It's
15 exactly the same idea. It's analogous.

16 And so no matter what you do, these two remain
17 different in harmonic rhythm.

18 Q. So I'd like to direct your attention to the screen now.
19 Can you just walk us through quickly what the differences are
20 that you identified with respect to the harmonic rhythm in each
21 work.

22 A. Yes. And as you can see — and I've already testified to
23 much of this — the first difference is the I chord in LGO has
24 a duration of three beats. You go to the right, the I chord
25 has a duration of 1.5 beats in TOL.

N521GRI1

Ferrara - Direct

1 No. 2. The iii chord, which is the second chord of
2 the progression, has a duration of five beats in LGO; the I/3
3 chord, which is the second chord in the progression in TOL, has
4 a duration of 2.5 beats.

5 No. 3. As a difference, the IV chord in LGO has a
6 duration of three beats, the IV chord in TOL has a duration of
7 1.5 beats.

8 The fourth, the fourth and final chord in LGO, in this
9 four-chord progression, the V chord has a duration of five
10 beats. The V chord in TOL has a duration of 2.5 beats.

11 And a fifth difference — and there are many others,
12 by the way — is that the duration of the anticipated chord is
13 a quarter note in LGO, but it is half that — the anticipated
14 chord in TOL is an eighth note in duration.

15 Those are just five of many other differences in the
16 chord progressions as recorded and written by Ed Sheeran in TOL
17 and as written in the deposit copy of LGO.

18 Q. Dr. Ferrara, I want to direct your attention to
19 Dr. Stewart's trial testimony.

20 Do you recall his testimony that your analysis of the
21 harmonic rhythm in "Let's Get It On" implies six chords in the
22 deposit copy?

23 A. Yes, I do.

24 Q. And I direct your attention to Dr. Stewart's slide 38.
25 What are we looking at here?

N521GRI1

Ferrara - Direct

1 A. This is an excerpt of I believe this is my declaration.
2 It's paragraph 28. So what you're seeing in the body is after
3 — after the No. 28, paragraph 28, is a direct excerpt from
4 that report. And what it suggests is that somehow I created a
5 six-chord progression in — in LGO, which is farcical.

6 I'll just give you one example. In the second
7 sentence, the harmonic rhythm in the four-bar chord progression
8 is two chords in bar 1 — no one disputes that — one chord in
9 bar 2. And if we could go back to that previous chart so that
10 I can just show you, so — the previous one before that. I'm
11 sorry. That's it.

12 So this is what I was talking about. So here, the iii
13 chord. It's the second chord in bar 1. The iii chord doesn't
14 end there. It continues. It's five beats. How many chords
15 are there in bar 2? One. It's the continuation of the second
16 chord from the first bar.

17 He does the same thing — that is, Dr. Stewart does
18 the same thing, and it's farcical — by suggesting that by me
19 saying that in bar 3 there are two chords — there are, we
20 agree — and in bar 4 there's only one chord, of course there's
21 only one chord. It's the V chord that continues. That doesn't
22 create six chords. It's simply showing that the duration of
23 the third and fifth chords and the V chords, the iii and the V
24 chords, continue into the next bar.

25 Q. At any point during this case have you ever stated that

N521GRI1

Ferrara - Direct

1 there are six, not four chords in the chord progression in
2 "Let's Get It On"?

3 A. No.

4 Q. Okay. Let's discuss the melodies in a little more detail
5 now.

6 In your own analysis of the melodies in "Let's Get It
7 On," did you rely upon the deposit copy?

8 A. Yes, I did.

9 Q. And regarding "Thinking Out Loud," how did you analyze the
10 melodies?

11 A. I analyzed the melodies by of course referring to the sound
12 recording but using the transcriptions that we discussed before
13 of the melodies and the chord progressions.

14 Q. Could you please take a look at what's been marked for
15 identification as Defendant's Exhibit 238.

16 Do you recognize this document?

17 A. 238.

18 Yes. This is my transcription of the opening melody
19 in LGO and the open — opening melody in TOL, and the reason it
20 says Melody A is because up until recently — I did it again.
21 Three times is a charm. Hopefully this will be the last.

22 Q. I raised a finger trying to warn you.

23 MS. FARKAS: Your Honor, we'd like to move Exhibit 238
24 into evidence.

25 MR. FRANK: No objection, your Honor.

N521GRI1

Ferrara - Direct

1 THE COURT: Received.

2 (Defendant's Exhibit 238 received in evidence)

3 A. All right. I will continue with my --

4 Q. Are your transcriptions of the melodies in "Let's Get It
5 On" consistent with the deposit copy?

6 A. Yes.

7 Q. Okay. Do you want to just briefly describe to us what this
8 exhibit is.

9 A. Yes. The — the exhibit is a collection of my
10 transcriptions of the melodies that were placed in issue, and
11 they continue beyond Melody A.

12 Melody A is the opening melody of both works, and in
13 previous reports of Dr. Stewart, he referred to this as Melody
14 A., and so that is why — since he has put the melody at issue,
15 I'm just using his terminology.

16 The next is Melody B, which we'll be getting to, and
17 finally, Melody C. These are my transcriptions of the portions
18 at issue in those melodies.

19 Q. And are your transcriptions of the melodies placed in issue
20 in "Thinking Out Loud" consistent with the published sheet
21 music of "Thinking Out Loud"?

22 A. Yes.

23 MS. FARKAS: If we could go to slide 13, Scott,
24 please.

25 Q. Can you please take a look at what's on the screen and let

N521GRI1

Ferrara - Direct

1 us know what we are looking at.

2 A. This is my transcription of Melody A, and the top staff is
3 the transcription just as it appears in the "Let's Get It On"
4 deposit copy. On the bottom is the opening — the
5 corresponding opening melody and lyric to TOL.

6 Q. And what has been added to the screen?

7 A. In the second comparative transcription, I have in LGO cut
8 in half the note values so that they align to facilitate the
9 comparison. So if something — if there is a note — for
10 example, here, this is an eighth note, the first note, sung to
11 "I've." This is the same note sung to "I've," but now it's a
12 16th. Everything is cut in half.

13 Q. And what effect, if any, does cutting the note values in
14 half have?

15 A. You could probably see that just in terms of the expanse of
16 the melodic phrase, that this is much — the cutting in half is
17 much more compact. The reason musicologists do this is to
18 facilitate the comparison. In so doing, you end up erasing
19 some of the differences; for example, the differences in metric
20 placement, where on the beat or within the beat a note occurs,
21 you give that up. The point, though, is that even erasing some
22 of those differences in rhythmic durations and in metric
23 placements, this melody cut in half, in LGO, and this melody —
24 both the opening melodies in LGO and TOL, are so dramatically
25 different that it doesn't matter that you cut it in half and

N521GRI1

Ferrara - Direct

1 lose some of those differences.

2 Q. Now we're looking at Melody A here. Did you also have the
3 notes in the other "Let's Get It On" melodies that Dr. Stewart
4 has placed in issue?

5 A. Yes.

6 Q. So let's stick with Melody A for now, which is the opening
7 melodies in each song.

8 At a high level, what, if anything, did you find with
9 respect to the so-called Melody A in each song?

10 A. They're dramatically different. The — the pitch sequence
11 — you saw some of that pitch sequence analysis with
12 Dr. Stewart — is clearly different, and I will show that. The
13 rhythmic durations of the notes are dramatically different.
14 The metrical placements of corresponding notes are different.
15 They're simply two very different melodies.

16 Q. And are there any musicologically significant similarities
17 between these two melodies?

18 A. There are none.

19 Q. Could you please play Melody A in each work at the piano,
20 consistent with your transcriptions.

21 MS. FARKAS: I think, Scott, if we could go to slide
22 14.

23 Q. Unless you're comfortable with this one.

24 A. Yes. So I'll beat out, in eighth beats, one, and two, and
25 (playing). That's LGO. I'll play it again. One and two and

N521GRI1

Ferrara - Direct

1 (playing).

2 Here is TOL. One and two and — sorry. One and two
3 (playing).

4 And now one after the other without interruption. LGO
5 (playing).

6 Q. Thank you. Let's move on to slide 15.

7 Can you please identify for us what has now been
8 projected on the screen.

9 A. Yes. In the top projection, you can see that above each of
10 the notes, I wrote the scale degree. The scale degree simply
11 identifies where on the scale each pitch occurs. So if there's
12 a 3, it means that this is on scale degree 3 in a D major
13 scale. (Playing). It's that note. And I have then trans —
14 transposed those scale degree numbers above each of the notes
15 in the chart at the bottom. And you saw similar charts with
16 Dr. Stewart. That matches them literally, just in the order
17 that they occur. And wherever they match, the same pitch, the
18 same scale degree, I highlighted it in green. So there are 14
19 pitches in the LGO Melody A. As you can see, they match up
20 with three in the Melody A in TOL.

21 Q. Now I just want to direct your attention to where your
22 chart of scale degrees, some of the 3s have what looks like a
23 lower case b in front of it. Can you explain what that is.

24 A. Yes. Part of the modality — we'll talk about modal
25 quality later. Part of the modality in LGO absent in the vocal

N521GRI1

Ferrara - Direct

1 melody of TOL is that there are in fact about a dozen, in the
2 overall deposit copy, examples of scale degree 3, which is F
3 sharp (playing), third scale degree of the (playing). That's
4 called the diatonic scale (playing). This note, this is the
5 flat 3 (playing). And that small b means flat. So flat 3
6 (playing). That is not part of the diatonic scale. And it is
7 often referred to as a blue note — that is, when the scale
8 degree 3 is not in this case F sharp (playing) but it's F
9 natural (playing). These are different pitches (playing). 3,
10 flat 3 (playing).

11 Q. Is it musically significant for two songs to share some
12 pitches here and there?

13 A. No. As everyone knows, there are seven pitches in a
14 musical scale, and even adding the flat 3 would make eight
15 pitches, so it would not be unusual for two works to share some
16 pitches in order.

17 Q. And if we look at the pitches that do line up, are they
18 consecutive?

19 A. No. They're scattered. They're fragmentary.

20 Q. And we've been discussing the pitch sequences for Melody A
21 in "Let's Get It On" and "Thinking Out Loud," meaning the order
22 of the pitches in each melody. Is what we are looking at on
23 these chart of scale degrees, is this melody?

24 A. No. And by the way, the Xs are x'g out all of the scale
25 degrees, all of the pitches that are out of sequence. The only

N521GRI1

Ferrara - Direct

1 ones that are not X'd out are those pitches or scale degrees
2 that align. So the first 3/3 and so forth.

3 So go ahead with that question?

4 Q. I was asking if pitches are melody.

5 A. Ah, whether pitches are melody. Pitches are a part of
6 melody, but alone they are not. A pitch is a melodic tone,
7 without duration, a melodic tone without duration.

8 Q. And what is a note?

9 A. A note is a pitch with duration. It's a dramatic
10 difference.

11 Q. In addition to pitch sequences, do you have an opinion on
12 whether, in assessing melodic similarities and differences, it
13 is important to also include an analysis of the rhythmic
14 durations and metric placements of those pitches?

15 A. Of course. You cannot do a proper musicological analysis
16 of melody without not only looking at the pitch sequence but
17 also doing an analysis of the — of the melodic rhythms, and
18 that melodic rhythms include the rhythmic duration of each
19 pitch and the metric placement, where it falls in the bar.

20 Q. Dr. Ferrara, I'd like to draw your attention to what's been
21 projected on the screen.

22 Do you recognize that?

23 A. Oh, yes. This — this is a definition that Dr. Stewart
24 gave of "melody" in a previous case.

25 Q. And in his definition, Dr. Stewart states that, "Along with

N521GRI1

Ferrara - Direct

1 pitch, duration (rhythm) is an essential element in the
2 formation and recognition of melodies. While we may separate
3 these elements for the purposes of analysis, it is essential to
4 remember that both are the defining characteristics of
5 melod[ies] . . ."

6 A. Yes, I agree with that, that I think he — he has
7 essentially the content of both the Harvard and Oxford
8 dictionaries of music, and that essentially says that it's not
9 just pitched sounds, it's pitched sounds in musical time, which
10 means rhythmic durations, and measured time, which means
11 they're in bars, and we have to — is this on beat three, is
12 this on beat four, is this a quarter note, is this a half note?
13 That is, as — as he has said, an essential element in the
14 formation and recognition of melodies, and part of any proper
15 musicological analysis.

16 Q. So at the risk of asking — I'll just ask the question.

17 Did you analyze the rhythmic durations and metric
18 placements of Melody A in both songs?

19 A. Yes.

20 Q. And did Dr. Stewart analyze the rhythmic durations and
21 metric placements in Melody A of both songs?

22 A. No.

23 Q. Is that proper musicological procedure?

24 A. It is not proper musicological procedure.

25 Q. So did Dr. Stewart actually analyze the melody in each

N521GRI1

Ferrara - Direct

1 song?

2 A. He only analyzed the pitch. And once again, that's the
3 difference in the definition between a pitch and a note. He
4 didn't analyze the notes in the melody because he never got to
5 rhythmic duration. He only analyzed the pitches, which is part
6 of the contour. The contour also follows the pitches, up and
7 down, but it doesn't tell us how long each note, the duration
8 of each note, where it falls into the bar. That's what makes a
9 melody.

10 Let me just give an example. Here is a — a melody
11 that — that you might find well known (playing). What
12 distinguishes that melody — which is only eight descending
13 notes, scale degrees 8, 7, 6, 5, 4, 3, 2, 1 — what
14 distinguishes it — ba, ba, ba, ba, ba, ba, ba, that's the
15 rhythmic duration. That's the rhythmic duration. That's
16 what's distinctive. That it's just 8, 7, 6, 5, 4, 3, 2, 1 is a
17 musical building block. That's been left out of Dr. Stewart's
18 analysis.

19 Q. Looking at what's projected on the screen, if you could use
20 your pointer and explain your findings regarding rhythmic
21 durations and metric placements in Melody A.

22 A. Well, first, let me say that I could spend a lot of time on
23 this. But just in terms of the metrical placement, the —
24 obviously, the first note here does not line up with the first
25 note; the second note here does not line up with the second

N521GRI1

Ferrara - Direct

1 note there. So the metrical placements within beats are
2 different.

3 But also, look at — for example, the first note is,
4 on scale degree 3 — here is the first note on scale degree 3,
5 but here, it comes in a 16th beat later in the bar and it is
6 tied over, it's held over, so in fact the rhythmic duration of
7 this note is an eighth. The rhythmic duration of this 3 is a
8 16th.

9 And if we go through, this continues through. And you
10 can see also that these notes are all off the beat. So the
11 first three notes, "I've been real," even — let's just do the
12 first two. "I've been." "I've been." (Playing). So, two and
13 (playing). It's off the beat. Two and (playing). I'll do it
14 this way. They're off the beat. Whereas (playing) these are
15 on the beat within beats one and — and eighth notes.

16 If you listen to the rhythm of just the first part of
17 the LGO melody, "I've been really try," just that first part,
18 here's the beat. And two and (playing), as compared with
19 (playing). And then the next, (playing). That was the next
20 bar (playing), in LGO as compared with (playing). That's a
21 dramatic difference in the rhythmic duration.

22 But what's also different, and not pointed out in the
23 analysis of Dr. Stewart, is the extraordinary difference within
24 each of these. And that is, first, all of these notes in LGO
25 move, one to the next, in stepwise order. That means they all

N521GRI1

Ferrara - Direct

1 move to the next adjacent key on a piano or the next adjacent
2 number. 3, 4, 5, 4, 3, 2, 3, 2, 3, 2, 2. Leaving out the
3 flats because they're all adjacent, all stepwise. That's not
4 the case here. From the 3 to the 5, we skipped 4. That's
5 called a leap. From this 5 to this 3, we skipped 4 again.

6 And here, we really are different in TOL as compared
7 to LGO. Here we have 2b. That is an interval, a space, of a
8 perfect fifth. 1, 2, 3, 4, 5, 6, 7. That's seven half-steps
9 away. Whereas in LGO, all of the notes are stepwise, and then
10 we have another leap. So this is another difference.

11 But there's also a very important modal difference.
12 If you listen (playing) to that opening melody in TOL, they're
13 all diatonic. They're all part of the D scale. But very
14 specifically, they all use five of those seven notes. Five of
15 them. And that's called pentatonic. Everybody knows what
16 "penta" means. "Penta" just means five, five tones. It's
17 these five tones (playing). That's the pentatonic part of the
18 diatonic scale (playing).

19 Now you may recognize that because in fact, for
20 centuries, traditional Chinese music has been heavily using the
21 pentatonic scale. It's also very popular in popular music.
22 That is the modality of the opening melodic phrases in TOL
23 (playing). Now let's compare that to what is going on in LGO
24 (playing). Blue note (playing); blue note (playing); blue note
25 (playing). Those blue notes are gorgeous. I love them.

N521GRI1

Ferrara - Direct

1 Beautiful writing by Mr. Townsend. But they are different,
2 they're very different, from (playing), from that.

3 Put all of that together, and these are dramatically
4 different melodies, from any perspective.

5 Q. Dr. Ferrara, if we were to look at the slide that's on the
6 screen, can you explain to us what the red marks indicate.

7 A. Yes. If one were to compare the melody, the opening melody
8 in LGO as it is written in the deposit copy and the TOL
9 transcription — and by the way, the only difference in
10 Dr. Stewart's transcription and mine is that additional grace
11 note in his. But if you were to — to X out every
12 corresponding note that is not the same pitch, one; two, not
13 the same rhythmic duration; and three, not the same metric
14 placement — this is an analysis I've done for more than 30
15 years, not just in popular music but before that in other music
16 — before litigation, that is, I should say — using that
17 benchmark, there's literally nothing left. The melody
18 disappears because they're so different. Nothing lines up.
19 Q. I'd like to read you some of Dr. Stewart's testimony from
20 last week when I asked him about the rhythmic duration of the
21 notes in Melody A.

22 "Q. You have to divide it to be the same?"

23 "A. The difference here you're talking about is so
24 minuscule in terms of the rhythmic duration that I think it is
25 completely insignificant."

N521GRI1

Ferrara - Direct

1 "Q. Okay. But they are different, correct?"

2 "A. Notationally it looks different but it's not.

3 We're talking about hundredths of a second in terms of
4 duration."

5 Do you agree with Dr. Stewart's opinion?

6 A. No. I strongly disagree. I think it's an absurd opinion.
7 The idea that you omit notes because they're fast in a musical
8 score is ludicrous. It's in the score; you analyze it. It's
9 uncomfortable, perhaps, for Dr. Stewart that these notes that
10 one would omit are notes of difference, and so he will say
11 these differences are insignificant, but in doing a proper
12 musicological analysis, you study all of the notes, and in so
13 doing, you find that they're all x'd out. So I strongly
14 disagree with that.

15 Indeed, let's think about the — the problem with
16 that. Every work that is fast, you'd say, well, the fast notes
17 we're going to leave out, because it's only a hundredth of a
18 second. We're just going to deal with the slow notes. We'll
19 have all these big gaps. We'll forget this section because
20 it's fast, we'll do this section because it's slow. It's an
21 absolutely absurd musicological position.

22 Q. Dr. Ferrara, I'd like to direct your attention to Stewart
23 slide 65.

24 And I want to draw your attention to the portion of
25 "Thinking Out Loud" that he presented to the Court last week.

N521GRI1

Ferrara - Direct

1 Does this reflect all of the lyrics from "Thinking Out Loud"?

2 A. I believe —

3 Q. If I direct your attention —

4 A. I believe the word "from" is missing.

5 Q. And can you indicate where that is.

6 A. Yes. If you look at the bottom line, "Will your eyes still
7 smile," what's written is, "Will your eyes still smile your
8 cheeks?" It's actually, "Will your eyes still smile from your
9 cheeks?"

10 Q. And the notes that are colored in blue, has he changed the
11 notes of the melody of "Thinking Out Loud"?

12 A. Yes. Dr. Stewart changed scale degree 3 with a blue note,
13 and it's also called the blue third, the flat 3, and so instead
14 of the note F sharp (playing), he's substituted it with
15 (playing) that.

16 Q. Dr. Ferrara, focusing on this opening melody of "Thinking
17 Out Loud," has Mr. Sheeran used a similar melodic sequence in
18 any of his prior songs?

19 A. Of this. Well, I'd just like to — to perhaps play the
20 first two phrases in that slide that you have up.

21 Q. Okay.

22 A. So here, let's first hear what Ed Sheeran actually wrote
23 (playing).

24 And this is what Dr. Stewart's written (playing).

25 That is simply not what Ed Sheeran wrote. I don't

N521GRI1

Ferrara - Direct

1 know what the purpose of the exercise is, but it dramatically
2 changes not only the note but the character. It changes what?
3 It changes the modality (playing).

4 Q. So Dr. Ferrara, focusing on this, the first line that we
5 see up here, when it's actually accurately —

6 MS. FARKAS: Let's take this down.

7 Q. So focusing on the opening melody of "Thinking Out Loud,"
8 has Mr. Sheeran used a similar melodic sequence in a prior
9 song?

10 A. Yes, certainly, yeah.

11 Q. And do you know what song that is?

12 A. You'll have to help me with the title again because I'm
13 just analyzing the music and not the —

14 Q. Does "The A Team" sound familiar?

15 A. "The A Team." Of course. My bad.

16 Yes. In the chorus, in each chorus, there is a very
17 similar melody that not only has pitches but it also has some
18 similarity in the melodic rhythm, but using, for example —
19 since this is the bar that's been set, using Dr. Stewart's
20 standard, are there pitches, is there a sequence of pitches in
21 the chorus of "The A Team" that is similar to the opening
22 melody in TOL, the answer is a resounding yes, and much more
23 than anything that Dr. Stewart suggested was similar in the two
24 songs at issue.

25 Q. Are you able to play those melodies for us at the piano?

N521GRI1

Ferrara - Direct

1 A. Yes. So it would be (playing). This is the first seven
2 pitches. I'm going to stop there. It continues. And there
3 are continued similarities. But there's an extra note in
4 between. But listen to that (playing). That's what — the
5 rhythm that it's sung. So Ed Sheeran sings this in each chord.
6 So take "The A Team," and that I believe is 2011, about three
7 years before TOL.

8 So here are the — here's the melody (playing).
9 Here's the opening of "Let's Get It On" (playing). Okay. So
10 (playing), as compared with (playing). Seven identical pitches
11 in sequence.

12 Q. Dr. Ferrara, you just said that you were playing the
13 opening melody from "Let's Get It On," but I think you meant
14 "Thinking Out Loud," correct?

15 A. Did I say "Let's Get It On"?

16 Q. You did.

17 A. I'm just going in the flow. Yes, it should have been —
18 that's my bad. It should have been "Thinking Out Loud." so
19 "Thinking Out Loud" (playing). "The A Team" (playing).

20 "A Team" (playing). "Thinking Out Loud." Seven
21 identical pitches in a row. There was nothing remotely as
22 similar between any of the melodies that Dr. Stewart put in
23 issue than this similarity between a work that Ed Sheeran wrote
24 in 2011 and "Thinking Out Loud."

25 Q. I'd like to direct your attention to what's being projected

N521GRI1

Ferrara - Direct

1 on the screen.

2 Can you please explain what we're looking at and the
3 significance of this slide, if any, to your analysis.

4 A. This is a transcription — the top is — it's from the
5 publication — if I can get this to work.

6 All right. Well, the top line is the — the melody as
7 it is — there it is. This is the melody as it is in the — in
8 the library collection. I have now transposed it to the key of
9 D and down an octave, and here I've created a comparative
10 transcription. This is "Espressivo," from *Variations*. This is
11 written by Francesco Pollini, who obviously died in 1846, and I
12 red highlighted the notes that have the same pitches. This is
13 essentially what Dr. Stewart did in his comparative analyses.
14 And as you can see, 1, 2, 3, 4, 5, 6, 7, the same seven notes
15 that — the same seven pitches that I just pointed out in "The
16 A Team," 1, 2, 3, 4, 5, 6, 7.

17 Q. Dr. Ferrara, have you also completed a combined analysis of
18 the chords and the melodies in what Dr. Stewart labels Melody A
19 in "Let's Get It On" and "Thinking Out Loud"?

20 A. Yes. So you can see that this is essentially the same
21 comparative transcription with LGO opening melody and TOL
22 opening melody, one on top, one on bottom, but now, in addition
23 to the notes, I've added the chord symbols. And let me mention
24 that the chord symbols are based on what chords are actually
25 sounding in TOL at that moment. So these are not the basic

N521GRI1

Ferrara - Direct

1 chords. This is what's actually sounding. But I'm going to
2 actually play the basic chords for you, and that will cut out
3 some of the difference. So I'm going to make the chords less
4 different between TOL and LGO. The key is the chord context
5 with the melody. Dr. Stewart suggested that in addition to the
6 combination of this common chord progression and the common use
7 of anticipation, in addition to that, we also had a melody
8 overlaying it. Well, we now know the status of those melodies
9 and how different they are. But the point is he made the
10 point, and one of the things that made the melodies more alike
11 is the fact that they have a chord progression that's going
12 that's very similar, at least.

13 I'm going to play the melody that you can see with the
14 F sharp minor chord, "I've really been try." So here's that
15 melody (playing). And here it is with the chord (playing).
16 Again (playing). So we've contextualized the melody with the
17 harmony (playing).

18 I'm going to do the same thing now within that box of
19 don't — "When your legs don't work like they," under the D/F
20 sharp (playing). LGO (playing). TOL (playing).

21 I don't find any help with the chords in making the
22 melodies sound more alike. This is even more dramatic now in
23 the last bar, the second half of the phrase, as you can see,
24 under the next chord, the G chord. And so here's a G chord
25 under the notes in the melody of LGO (playing). Again

N521GRI1

Ferrara - Direct

1 (playing). And here it is in L — TOL (playing). The chords
2 don't help. The melodies are still dramatically different.

3 And finally, with respect to the fourth chord, while
4 there are two notes under the A chord (playing), "Baby," there
5 are no melody notes under the A chord in TOL.

6 Q. In conclusion, Dr. Ferrara, do you find any musicological
7 evidence that Melody A in "Thinking Out Loud" was copied from
8 Melody A in "Let's Get It On"?

9 A. There's absolutely no remote evidence of copying, let alone
10 similarity.

11 Q. And in fact, did Dr. Stewart even analyze the melody in
12 what he called Melody A?

13 A. By disregarding what is defined as notes and only dealing
14 with pitches, he failed; he failed by omission to analyze the
15 melodies at issue.

16 MS. FARKAS: Your Honor, I think we're at a good
17 breaking point. We're about to move on to the next melodic
18 portion. So if it's okay with your Honor, we'd like to break
19 for lunch?

20 THE COURT: We'll resume at 2:15.

21 THE DEPUTY CLERK: All rise.

22 (Luncheon recess)
23
24
25

N52HGri2

AFTERNOON SESSION

2:25 p.m.

(Trial resumed; jury present)

LAWRENCE FERRARA, resumed.

BY MS. FARKAS:

Q. Good afternoon, Dr. Ferrara.

A. Good afternoon.

Q. Let's move on to the second set of melodies that Dr. Stewart has placed in issue, a portion of the melody in "Let's Get It On" at the end of verse four and into the beginning of chorus two as compared to a melody in the chorus in "Thinking Out Loud."

Prior to his trial testimony, did Dr. Stewart have a name for these second sets of melodies in each work?

A. Melody B.

Q. And at a high level, what, if anything, did you find with respect to the second set of melodies that Dr. Stewart has placed in issue?

A. There are no relative similarities in Melody B other than some contour similarity, which is very, very scant and thin. But, once again, the melodies as notes are simply very different.

Q. Are there musicological similarities between Melody B in "Let's Get It On" and "Thinking Out Loud"?

A. No.

N52HGri2

1 Q. What are we looking at, Dr. Ferrara?

2 A. This is my comparative transcription of the two melodies at
3 issue that we call Melody B. On top is the passage from "Let's
4 Get It On" and on the bottom is the passage from "Thinking Out
5 Loud."

6 Q. Could you please play Melody B in each work on the piano
7 consistent with your transcriptions.

8 A. Yes. I'll give a few beats so you know what the beat is.
9 4 and 1 (piano played). TOL, 1 and 2 (piano played). I can
10 play them back to back without interruption. LGO (piano
11 played). TOL (piano played).

12 Q. Can you please identify for us what has now been projected
13 on the screen.

14 A. As we did with melody A, given the scale degrees that are
15 written above the notes in the transcription on top, I've
16 simply brought them down into a chart of the scale degrees in
17 the order in which they occur. And as you can see, when
18 pitches match, I've highlighted them in green.

19 Q. And just to be clear, if you look at the transcription at
20 the top, you have halved the note values in LGO?

21 A. That is correct, which is what it says, note values in LGO
22 are halved.

23 Q. How many pitches line up in Melody B in each work?

24 A. As you can see, four pitches out of 11 in LGO line up.

25 Q. And if we look at the pitches that lineup, are they

N52HGri2

1 consecutive?

2 A. Only two pitches, iii-iii, are consecutive, still
3 considered a fragment.

4 Q. In addition to analyzing the sequences of the pitches, did
5 you perform an analysis of the rhythmic duration and metric
6 placements in Melody B in "Thinking Out Loud" and "Let's Get It
7 On"?

8 A. Yes, I did.

9 Q. Did you Dr. Stewart perform an analysis of the rhythmic
10 durations and metric placements in Melody B?

11 A. No, he didn't.

12 Q. Did Dr. Stewart actually analyze the melody in this section
13 of each song?

14 A. To the extent that we use Dr. Stewart's definition, which
15 draws on the Oxford and Harvard dictionaries of music, he did
16 not because he failed to analyze the notes, that is, the
17 harmonic beat, melodic rhythm and the metric placement and the
18 pitches.

19 Q. What is the similarity that Dr. Stewart has identified with
20 respect to this second melody?

21 A. Essentially, that there is a descending contour that moves
22 up at the very end, so a movement of the pitches down and then
23 up at the end.

24 Q. Is movement of pitches down a scale, was that commonplace
25 prior to "Thinking Out Loud"?

N52HGri2

1 A. Yes. In fact, there are three basic contours, as you can
2 — a melody can go up (piano playing), a melody can go down
3 (piano playing), or a melody can just simply have repeated
4 pitches (piano playing). That's it, up, down, repeat. And so
5 contour, in and of itself, does not provide an awful lot of
6 information.

7 Q. Focusing on descending down a major scale, was that
8 something that was commonplace prior to "Let's Get It On"?

9 A. Indeed, yes.

10 Q. Let's look at the next slide.

11 Can you please explain your findings regarding the
12 rhythmic durations and metric placements of Melody B in "Let's
13 Get It On" and "Thinking Out Loud"?

14 A. Yes, and I'll try to expedite this.

15 So, here, the differences in metric placement, but in
16 particular in rhythmic duration are stark. For example, this
17 begins with eighth note quarter note. This begins with eighth
18 note 16th note. The 16th is literally a quarter of the
19 rhythmic value of a quarter note. Putting it in another way,
20 this note *some to you* in LGO is four times than the second
21 note, *some to me*.

22 The continuation here of the disparity in the rhythm
23 is really marked by these next three notes. You can see that
24 there is a "3" in italics, the number 3 in italics. That's not
25 a scale degree. That's the sign that tells us that these three

N52HGri2

1 notes *into your, into your*, are a triplet. They divide the
2 beat into three, not into two or into four. So it becomes
3 triple D, da da da. There's nothing like that in the LGO
4 Melody B. So that is quite different.

5 And once again, the melody LGO has, if you will, a lot
6 of starts and stops. For example, we have *believe* and then
7 this is — this is off the beat, *believe in love*. Those are
8 all off the beat. So what is the beat? We have (piano
9 playing). All those are off the beat. Whereas, if you look at
10 into your loving arms, it's all basically without any
11 interruption of the beat (piano playing).

12 And those first three notes was the triplet, triple D
13 da da da da da. That's into your loving arms, as compared with
14 (piano played).

15 So the rhythmic durations, the metric placements are
16 really quite different. The similarity, which is scant, is
17 simply moving down from scale degree 5 to 4 to 3 (piano played)
18 and then notice to 1 -- not yet, Mr. Duvall.

19 OK. It's 5, 4, 3, and then skipping to 1. That's the
20 descent, 5, 4, 3, 1. What's the descent in TOL? 5, 4, 3, 2,
21 no 1. So they don't even go in the descent in the same way.

22 And also notice the disparity in the number of
23 repetition of scale degrees. There's one scale degree 5, just
24 one, but there are three scale degree 5s in TOL. There are two
25 scale degree 4s in LGO, but there are three scale degree 4s in

N52HGri2

1 TOL. There are three scale degree 3s next, but only two in
2 TOL, and so forth. And once again, you have the problem of the
3 1 as compared to the 2. The scant similarity is that, yes,
4 they both turn up at the end on (piano played). But this is
5 similar to suggesting that the word "crab," c-r-a-b, is the
6 same as the word "absent" because they both have a-b. But the
7 point is that a-b is preceded by different letters in these two
8 words. That's essentially what we're finding here, these
9 fragmentary and thin similarities that are simply meaningless.

10 Q. Which notes in Melody B and "Let's Get It On" and "Thinking
11 Out Loud" —

12 A. I'm sorry. Could you speak to the mic.

13 Q. Which notes in Melody B in "Let's Get It On" and "Thinking
14 Out Loud" have both the same pitch in same metric position and
15 the same rhythmic duration?

16 A. None.

17 Q. Can you explain what was just projected on the screen?

18 A. Yes, it does, it correctly represents that.

19 Q. Am I correct that the red Xs show the notes that do not
20 share the same pitch or in the same metric position or the same
21 rhythmic duration?

22 A. That is correct, they do not.

23 Q. Did you also complete a combined analysis of the chords and
24 the melodies in what Dr. Stewart has labeled "Melody B" in both
25 songs?

N52HGri2

1 A. Yes, I did.

2 Q. Can you explain to us what's projected on the screen?

3 A. Yes. So what we have here is the chords on top and the
4 same melody below with the same scale degrees. One of the
5 interesting things about these corresponding, or not so
6 corresponding, melodies that Dr. Stewart has put in issue is,
7 as you can see, they occur with — in different parts of the
8 progression. Remember, the progression in D in LGO is D F
9 sharp minor G A. Well, this starts in the midst of the F sharp
10 minor chord, the second chord of the chord progression, whereas
11 in TOL it starts, actually, here on the G chord, which is the
12 IV chord, not the iii chord, and then A, which is the V chord.

13 Once again, as I mentioned, even though these chords,
14 particularly the A11, is actually what's sounding when we have
15 the singing of *take me into your loving arms*, I am going to
16 play that as a straight ahead A chord so that it is more like
17 the A chord. I'm going to do the same in LGO. That is, I'm
18 going to make them as much — as similar as possible with
19 respect to the chord to the basic chord progression. So just
20 A, not A7, just A, not A1.

21 If we can, if it's possible, Mr. Duvall, to circle
22 this F sharp. Sorry to thrust that upon you on the spot.

23 MS. FARKAS: I think you need to go back a slide,
24 Scott.

25 A. That's fine. We've got a yellow mark there.

N52HGri2

1 Remember, F sharp minor is the second chord in the
2 chord progression in LGO. The corresponding chord is D/F
3 sharp. This is the second chord in the chord progression. If
4 you could do a yellow slash through that as well.

5 So this tells you that at this point we're in the
6 second chord. At this point we're in the second chord. So the
7 chords themselves don't even align as you can see. The G with
8 the F sharp, the G with the A, the A with the D, and so forth.
9 But with that in mind, let's listen to the chord with the
10 melody above it. So here's the F sharp minor chord, which is
11 carrying over from the bar before it, three, four, one. Those
12 are the only two notes (piano played).

13 If we look at the corresponding chord that is the
14 second chord of the chord progression in TOL, there's no
15 melody, so there's no — nothing comparable.

16 We next go to the G, and in LGO, we have "*believe in*"
17 under the G (piano played). Again (piano played). If we look
18 under the G in TOL, there are no notes. So once again there is
19 no corresponding similarity with respect to the melody that is
20 being combined with the chords.

21 And if we look at the A chord — again, not A7, I'm
22 going to play it as the basic — and if we look at the notes
23 that follow, it is this (piano played). Again (piano played).
24 And we compare that to just a straight A chord here. Sorry
25 (piano played). Again — that's the wrong chord (piano played)

N52HGri2

1 as compared with LGO (piano played). What is similar is that
2 ending, da dum, two notes, a-b, crab, absent.

3 Q. To be clear, Dr. Ferrara, did you find any musicological
4 evidence that Melody B in TOL was copied from Melody B in —
5 sorry, let me start that again.

6 Did you find any musicological evidence that Melody B
7 in "Thinking Out Loud" was copied from Melody B in "Let's Get
8 It On"?

9 A. No, no musicological evidence at all.

10 Q. In fact, once again, did Dr. Stewart even analyze melody in
11 what he called Melody B?

12 A. Dr. Stewart failed to include in the analysis of melody the
13 melodic rhythms and the metric placements.

14 Q. Without those two elements, are we talking about melody?

15 A. Pitches by themselves are not melody, that's correct.

16 Q. Let's move on to the third set of melodies, the melody at
17 the beginning of the verse two in "Let's Get It On" as compared
18 to the melody in the interlude of "Thinking Out Loud."

19 Prior to his trial testimony, did Dr. Stewart have a
20 name for this third set of melodies?

21 A. Yes, Melody C.

22 Q. Does Melody C in "Let's Get It On" appear in the same part
23 of the song as Melody C in "Thinking Out Loud"?

24 A. No. As you stated, the Melody C in TOL is in the
25 interlude, and there is no interlude at all in LGO.

N52HGri2

1 Q. At a high level, what, if anything, did you find with
2 respect to the so-called Melody C in each song?

3 A. Once again, the similarities are bare, and what is similar
4 is essentially moving down the scale and repeating pitches as
5 you do. So we know that the D scale has seven scale degrees,
6 1, 2, 3, 4, 5, 6, 7. And when we're moving down from the high
7 note, we call this D, which is scale degree 1. We call it 8.
8 So 8, 7, 6 — essentially, what we have is just repeated notes
9 on 8, repeated notes on 7, repeated notes on 6, and so forth,
10 but different numbers of repeated notes.

11 Q. Are there any musicologically significant similarities
12 between Melody C in "Let's Get It On" and "Thinking Out Loud"?

13 A. No, absolutely. The easiest way to talk about that lack of
14 sufficient similarity is to think about an exercise that
15 undoubtedly thousands and thousands and thousands of students
16 practice every day on wind instruments and string instruments
17 and, believe it or not, on the piano as well but particularly
18 on wind instruments and string instruments.

19 I remember when my son in grade school was playing
20 trumpet, and he would play an exercise, practice exercise,
21 that, again, students do all the time. D, D, D, D — it would
22 be 8, 8, 8, 8, 8, 7, 7, 7, 7, 7, 8, 8, 8, 8, 7, 7, 7, 7, 6, 6,
23 6, 6, 5, 5, 5, 5, or as triples, D, D, D, C sharp, da da da da
24 da (piano played). That's a trombone, da da da da da. That is
25 a French horn. That's a violin (vocalizing).

N52HGri2

1 How many times have you been in an elementary school
2 and listened to an elementary school band doing that or a
3 beginning orchestra, string orchestra, fourth or fifth grade
4 (vocalizing). That is the similarity, but the similarity
5 doesn't include four notes or three notes on each, it's a
6 different number of notes on each scale degree.

7 Q. So let's look at slide 28, please.

8 What are we looking at on the screen, Dr. Ferrara?

9 A. I'm sorry?

10 Q. What are we looking at on the screen?

11 A. The top line is that Melody C that Dr. Stewart has placed
12 at issue, and the bottom line is TOL.

13 Q. Could you please play Melody C in each work on the piano
14 consistent with your transcriptions on the screen.

15 A. Yes. Tapping out the beat in eighth, 1 and 2 (piano
16 played). And now TOL, 3 and 4 (piano played).

17 Q. Now I'd like you to look at what's projected on the screen.
18 And what are we looking at here, Dr. Ferrara?

19 A. The same exercise as before, and that is to simply
20 transport the upper numbers over the notes down into a chart.
21 And as you can see, the notes highlighted in green tell you out
22 of this — I think it's 15 notes in LGO — out of those 15
23 notes, five pitches, not notes but pitches, line up.

24 Q. And what are the arrows next to the 3 and the 5 on the LGO
25 line stand for?

N52HGri2

1 A. The change of direction. The interesting thing is that
2 while the purported similarities in this descent starting on 8
3 and moving down, down to 6 here but down to 5 here, suddenly a
4 complete change of direction and contour. Instead of going
5 down, we now leap up, and because of that, we need to note that
6 this 3 is moving up and not down. Because if we look at 5 and
7 think of 3, we might think it's this, like down here.

8 Can you adjust that, Mr. Duvall? Sorry. Thank you.

9 At the very end of TOL we have 5, 3 (piano played).
10 We have 5, 3 here as well, but it's going in the other
11 direction. Instead of (piano played), it's a completely
12 different melody (piano played).

13 And so in order to show the reader that, I put an
14 upward arrow 3 to show that, in fact, this 3 is not below this
15 5 like it is in TOL, but, in fact, it goes in the opposite
16 direction and a huge leap. And then we have 3 going up to
17 5 again. So to show that this 5 is not this 5, it's a whole
18 octave, 12 half steps apart, to show that this 5 is not the
19 lower 5 once again an arrow.

20 These leaps at the end are completely different from
21 an almost completely stepwise descent, say, for the last
22 smaller interval of a third (piano played) as compared to
23 (piano played) and then another leap down. So the contour is
24 quite different. The only similarity in the contour is at the
25 beginning, and it's different as you can see 8, 8, two 8s,

N52HGri2

1 three 8s, three 7s, two 7s, and then very important, in TOL
2 after the three 7s, the descent continues. It's never
3 interrupted, 6, 6, 6, 5, 5, 5.

4 Notice what happens in LGO, 8, 8, 7, 7 descent, but
5 then it goes up, back up to 8, and then 7, 7, and then a single
6 6 as compared with three 8s, three 7s, three 6s, three 5s.
7 These are really completely different melodies, only similar by
8 the fact that they have some number of notes that are repeating
9 on descending scale degrees. And, again, what we're talking
10 about is an exercise that thousands of students practice every
11 day on wind and instrument and string instruments.

12 Q. Did you perform an analysis of the rhythmic durations and
13 metric placements in Melody C of "Let's Get It On" and
14 "Thinking Out Loud"?

15 A. Yes. And because I'm going on much too long, and I
16 apologize, if you know, the melodic rhythm in TOL is marked by
17 these triplets, da da da, da da da, da da da, da da, and then
18 two 8s, da da da, da da da, da da da, da da, which is
19 completely different from the melodic rhythm here (piano
20 played).

21 And let's just compare that barely similar part to
22 this. So play LGO one more time, *we're all sensitive people*,
23 and then we're just going to go right to the la la la (piano
24 played). TOL (piano played).

25 Q. Did Dr. Stewart perform an analysis of the rhythmic

N52HGri2

1 durations and metric placements in Melody C?

2 A. No.

3 Q. Which notes in Melody C in "Let's Get It On" and "Thinking
4 Out Loud" have the same pitch, the same rhythmic duration, and
5 the same metric placement?

6 A. None that line up.

7 Q. Did you find any significant similarity between Melody C in
8 "Let's Get It On" and Melody C in "Thinking Out Loud"?

9 A. None.

10 Q. So what is the similarity that Dr. Stewart has identified?

11 A. Kids practicing (piano played). That's it. Once again,
12 with a different number of notes on each of those descending
13 scales, and in one case, LGO, going up and then going back
14 down; and in the case of TOL, only going down.

15 Q. Has this repeating pitches on descending scale degrees
16 similarities been used in other songs that use the combination
17 of the chord progression and anticipation at issue in this
18 case?

19 A. Yes. "Since I Lost My Baby" as recorded by — I've
20 forgotten.

21 Q. Want to see if you can get it? Mr. French.

22 A. Yes, Ray French. OK. So Ray French, 1966 release of
23 "Since I Lost My Baby," here's the introduction. This is in
24 the key of E. Would you like me to play it?

25 Q. Sure.

N52HGri2

1 A. OK. All right. This is in the key of E. This is scale
2 degree 8. Remember (piano played). Ray French 1966, "Since I
3 Lost My Baby" (piano played).

4 What we just heard was 8, 8, 8, 7, 7, 6, 6, 6, 5, 5.
5 That's actually closer to the melody in TOL than the melody at
6 issue in LGO is to TOL. Furthermore, it has the identical LGO
7 chord progression and anticipation (piano played). This is the
8 basic chord progression in LGO (piano played). Ray French
9 (piano played). And if we add the melody (piano played).

10 Q. We'll return to that song a little bit later.

11 Staying with Melody C, did you also perform a combined
12 analysis of the chords and the melodies in what Dr. Stewart has
13 labeled Melody C?

14 A. Yes, and here the chords line up so D, F sharp minor, G, A,
15 D, D/F sharp, G, A. And if we simply play the notes, I'll play
16 the chord and the notes that are sounding in the vocal with it
17 from the beginning just in the first bar, so we're *all*
18 *sensitive people*. I'll put the melody up here (piano played)
19 so that we don't run into the chords below.

20 So three, four, one, two (piano played). The notes
21 again (piano played). Here it is, the D on all (piano played).
22 So that's going from *all sensitive p-*. Those are the notes
23 that are sounding with the F sharp minor chord (piano played).
24 And the corresponding chord in TOL is D/F sharp. Here we are,
25 and there's just two la la notes there, so (piano played), as

N52HGri2

1 compared with (piano played).

2 Moving ahead with G, we have just one note (piano
3 played). That's it. In G here, we have the 8, 7, 7, 7 also on
4 the la's (piano played). And finally on the A, a real
5 difference in the melody with those huge leaps upward, there's
6 the A with *with so much*, as compared with the notes with A here
7 in TOL (piano played). So LGO (piano played) As compared with
8 (piano played). So the chords don't save the differences in
9 the melody. If anything, it shows how different the melodies
10 are.

11 Q. Continuing with this third set of melodies, Dr. Stewart
12 also compared the vocal melody at the beginning of verse two in
13 "Let's Get It On" to the guitar melody in the interlude of
14 "Thinking Out Loud."

15 Is the guitar melody in the interlude of "Thinking Out
16 Loud" meaningfully different from the vocal melody in the
17 interlude of "Thinking Out Loud" we were just discussing?

18 A. No. In fact, the only difference is there is an extra note
19 on this rest right here. So instead of da da da, it's da da da
20 da, but exactly the same note, 8, 8, 8, instead of these two
21 8s. And here at the bottom instead of 5, 3, it's 5 — it is 5,
22 5. So what you hear — here's the vocal, la, la, la. Here's
23 the guitar (piano played).

24 That's it. So only one extra note up front and one
25 slightly changed pitch at the end. Otherwise, the sung part of

N52HGri2

1 Melody C in the interlude of TOL, it's essentially the same,
2 with those two exceptions, as compared to the guitar melody.

3 Q. So do all of your opinions and conclusions regarding the
4 vocal melody in the interlude of "Thinking Out Loud" also apply
5 with respect to the guitar melody in the interlude of "Thinking
6 Out Loud"?

7 A. Yes, they do.

8 Q. Dr. Ferrara, in sum, what is your opinion of Dr. Stewart's
9 conclusions regarding Melody C, including both the vocal melody
10 and the guitar melody, in the interlude of "Thinking Out Loud"?

11 A. Putting the combination together, the underlying chord
12 progressions, first, are not the same. But even if they were,
13 even if, for example, we were talking only about a I-iii-IV-V
14 chord progression, the basic chord progression in LGO, we're
15 talking about a musical building block that was in 80 songs
16 prior to TOL. So that in and of itself is not — is not
17 meaningful.

18 Importantly, though, that chord progression is not the
19 same in TOL. The anticipation is — is essentially not the
20 same because of the four bar, remember the four bar phrase in
21 LGO but the two bar phrase in TOL? Did I cut it in half for
22 the purpose of analysis? Of course, but the point is it
23 doesn't change the fact that the deposit copy is in that longer
24 format, and so the anticipation is not the same. But even if
25 you say, well, they sound the same, the point is that they are

N52HGri2

1 not the same on the sheet music, but even still then I found
2 other works that also embody that combination besides the Ray
3 French song.

4 Finally, when you add the melodies — I think I've
5 demonstrated that when you add the melodies to that chord
6 progression, it actually undermines any similarity because the
7 melodies are so different. So the combination doesn't help
8 when you add melody to the chord progression and the
9 anticipation therein.

10 Q. Did you find any musicological evidence that Melody C in
11 "Thinking Out Loud" was copied from Melody C in "Let's Get It
12 On"?

13 A. None at all.

14 Q. Once again, did Dr. Stewart even analyze melody in what he
15 calls Melody C?

16 A. Due to the omission of necessary parts of the analysis, the
17 answer would be, since he delimited his analysis to pitches and
18 contour, no, he didn't complete an analysis of melody.

19 Q. I'd like to direct your attention now to Dr. Stewart's
20 testimony regarding similarities in the modal quality between
21 "Let's Get It On" and "Thinking Out Loud."

22 What is your understanding of the modal quality that
23 he was referring to?

24 A. He's correctly referring to a kind of blues infusion in
25 "Let's Get It On." There's no question that it is there, and

N52HGri2

1 it's prominent in the use of the blue third (piano played).

2 That's part of the opening phrase. There are five blue notes
3 in the first part of "Let's Get It On" (piano played). That
4 has a distinctive blue note quality.

5 Q. Are there any blue notes in the vocal melody of "Thinking
6 Out Loud"?

7 A. I did not find any blue notes in the vocal melody in
8 "Thinking Out Loud."

9 Q. To be clear, does Ed Sheeran sing any blue notes in the
10 commercially released recording of "Thinking Out Loud"?

11 A. I don't hear any blue notes in Ed Sheeran's vocal.

12 MS. FARKAS: Yeah, I think we've covered this before,
13 Scott. Thank you.

14 Q. Setting aside vocal melody, do the instrumental parts in
15 "Thinking Out Loud" include any blue notes?

16 A. Yes, in the guitar part — there's a guitar solo. That's
17 not to be confused with Melody C. There's a before — in fact,
18 together with Ed Sheeran's la, la, la, la, la, la, la, with
19 that la, la, la descending melody, there's a guitar solo that's
20 already begun and continues. That's not the descending Melody
21 C guitar solo. In that guitar solo at the start of the
22 interlude, there are three E Sharps. They're actually written
23 as E sharp in the published sheet music, which is the same as F
24 natural. So there are three blue notes in the guitar solo in
25 the interlude of TOL.

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1 Q. Just to be clear, are there any blue notes in the Melody C
2 guitar melody that we analyzed earlier?

3 A. None.

4 Q. Did Dr. Stewart transcribe any blue notes in Melody C in
5 "Let's Get It On" during his testimony?

6 A. Yes.

7 Q. You testified that there are three blue notes in the guitar
8 solo melody in the interlude of "Thinking Out Loud." Are there
9 any blue notes in any instrumental melodies in "Let's Get It
10 On"?

11 A. There are no instrumental melodies in "Let's Get It On."

12 Q. In summary, what is your opinion of the purported
13 similarity that Dr. Stewart has identified with respect to the
14 modal qualities in blue notes?

15 A. There's no question that there is a wonderful and rich
16 blues infusion through the use of the blue note in "Let's Get
17 It On." The use of the blue note in the guitar solo does not
18 add a — that level of blues infusion. There's simply — in
19 the vocal part there really isn't a blue note present. And so,
20 in fact, the modalities are different. And I mention this. It
21 will just take ten seconds. Remember, this is the modality of
22 the melody in the opening, in fact, the opening phrases of
23 "Let's Get It On" — I'm sorry, of "Thinking Out Loud." It's
24 pentatonic (piano played). That is quite different in modality
25 to the wonderful blues infusion of (piano played) in "Let's Get

N52HGri2

1 It On."

2 Q. Earlier in your testimony, you testified that you found
3 songs that combine this basic — same basic chord progression
4 at issue in "Let's Get It On" or "Thinking Out Loud" and the
5 anticipation that the plaintiffs have placed in issue in this
6 case.

7 Excluding songs authored by Van Morrison, which we'll
8 go over separately, how many songs did you find that combined
9 the chords at issue with the anticipation of the second and
10 fourth chords?

11 A. Six songs.

12 Q. What, if anything, is the significance of these songs to
13 your opinion in this case?

14 A. It shows that, first, "Let's Get It On" is not the first
15 song to have combined these elements. That, in fact, other
16 songs created prior to LGO and in one case between LGO and TOL
17 used the LGO chord progression and anticipation, and in two
18 other cases from those remaining — from the six that we just
19 mentioned, one also predates LGO and one is after LGO but
20 before TOL.

21 What that tells me is that, once again, not only was
22 LGO not the first, but, importantly, that this unremarkable
23 combination of a building block chord progression, basic chord
24 progression, and a century's old building block called
25 "anticipation" is simply not remarkable in LGO or in TOL.

N52HGri2

1 These are commonplace elements that can easily be put together.

2 Q. Are you familiar with the song "You Lost the Sweetest Boy"
3 recorded in 1963 by Mary Wells?

4 A. Yes, I am.

5 Q. And does that song combine the I-iii-IV-V chord progression
6 with anticipated second and fourth chords?

7 A. Yes, it does.

8 Q. And in addition to combining the chord progression and the
9 harmonic rhythm at issue, does "You Lost the Sweetest Boy"
10 include any melodic similarities to "Let's Get It On" or
11 "Thinking Out Loud"?

12 A. Yes, it does.

13 Q. In what key is "You Lost the Sweetest Boy"?

14 A. "You Lost the Sweetest Boy," once again, released in 1963,
15 ten years before the creation of LGO, is in the same key as
16 LGO, the key of E flat major.

17 Q. Dr. Ferrara, did you prepare any charts or graphics that
18 could demonstrate your testimony on this point?

19 A. You're looking at the graphic summary. Here we go with the
20 graphic itself. And so you may recall that this is the kind of
21 graphic that I used for the two songs at issue, for LGO and
22 TOL, but what is important here — and the pointer is not
23 working, Mr. Duvall — what's important here is that I have
24 halved the — there we go — on the top line I've halved the
25 four bars into two bars. And I mentioned that earlier, I think

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1 I've explained why, to facilitate the comparison.

2 But what you'll notice is TSB is "You Lost the
3 Sweetest Boy," so this is the Mary Wells song. You can see
4 that the 1, 3, 4, 5 line up identically in harmonic rhythm, and
5 of course, they are the same basic chord progression, whereas
6 with respect to TOL, the harmonic rhythm lines up, but there is
7 a I-iii chord. This is the same thing down here. It's now
8 tripartite rather than just LGO and TOL.

9 Q. What has been added to the screen?

10 A. I'm sorry?

11 Q. What has been added to the screen?

12 A. We just added the earlier chart of just LGO and TOL where
13 you can see, in fact, in the deposit copy the chord progression
14 is four bars in LGO, not two. For the purposes of analysis,
15 I've halved it here to two plus two plus two, but it still
16 remains four as I explained before.

17 Q. And if the harmonic rhythm of "Let's Get It On" and
18 "Thinking Out Loud" were the same, would that be significant to
19 you?

20 A. No, it would not. It's a commonplace harmonic rhythm. I
21 clapped it out several times earlier.

22 Q. And what, if anything, does the chart projected on the
23 screen show with respect to the similarity in the harmonic
24 rhythm in "Let's Get It On," "Thinking Out Loud," and "You Lost
25 the Sweetest Boy"?

N52HGri2

1 A. What it shows is that every chord in TOL is either shared
2 with TSB, "The Sweetest Boy," or is simply not the same as LGO.

3 Q. If we were to place a red "X" over each chord in "Thinking
4 Out Loud" for which any harmonic similarity is also found in
5 "The Sweetest Boy" and/or is not shared between LGO and TOL,
6 would any harmonic similarity remain between "Let's Get It On"
7 and "Thinking Out Loud"?

8 A. No, none would remain.

9 Q. And just to be clear, can you explain what you mean by
10 "harmonic similarity."

11 A. By "harmonic similarity," I mean similarity in the chords,
12 that is, the basic chord progression, which we've gone over,
13 and also the harmonic rhythm, that is, with 1 and 3, in this
14 case on the downbeat, and 2 and 4 anticipated.

15 Q. Dr. Ferrara, using the sheet music projected on slide 46,
16 could you please explain the harmonic and melodic similarities
17 you found in "You Lost the Sweetest Boy" as compared to "Let's
18 Get It On" and "Thinking Out Loud."

19 A. Yes. So what we have on the left is the first page of the
20 published sheet music of "You Lost the Sweetest Boy." And
21 starting here, we actually have the chord progression that is
22 the same as the basic chord progression in LGO with the
23 anticipation. I'll play it (piano played). 1, 2, 3, 4, 1, 2,
24 3, 4. So it is the same. It occurs two times.

25 Q. And what about — I'm sorry, what about the melodic

N52HGri2

1 similarities?

2 A. We have to go back, please, to the other slide. Thank you.

3 So in the very same place, right down here at the
4 bottom, here's the opening melody, so (piano played). Again
5 (piano played). And if I continue with the chord progression.
6 (piano played). Listen to those opening notes, 3, 5, 6, 5, 3
7 (piano played).

8 OK. Those are the same opening notes as TOL (piano
9 played), TOL. (Piano played) Mary J. Wells ten years before
10 the creation of LGO.

11 Now, what's really important is that's not meaningful.
12 That's the kind of analysis that Dr. Stewart did, oh, we've got
13 five notes or four notes — not even notes, five pitches, and
14 so forth, lining up. It's not meaningful. I'm not suggesting
15 it is. I'm simply trying to make clear that, based on the
16 criteria used and the analysis used by Dr. Stewart, that those
17 similarities that he found are in a song that was released ten
18 years before "Let's Get It On."

19 Q. And are there any blue notes in this song?

20 A. Yes. If we could now go to the next, we're on the second
21 page now here of "You Lost the Sweetest Boy," and there is
22 again a wonderful switch in the modality starting there with
23 the title lyrics, *And lost the sweetest boy that you had that*
24 *time, the sweetest boy that you had.*

25 So here is that melody now with the title lyrics

N52HGri2

1 (piano played). Da da dum, 3, 2, 2, that's a blue 3, 2, 2, 3,
2 2, 2. And of course, you can see here this is the deposit copy
3 of "Let's Get It On," those very notes (piano played)

4 So is that significant, that in addition to having the
5 chord progression and the harmonic rhythm, there's some blue
6 notes that we can point to? No, it's not. It's just simply
7 answering a charge that it is significant in "Let's Get It On"
8 and TOL, or in many cases with respect to TOL, it's not
9 existent.

10 Q. Let's move on to the next song. You mentioned "Since I
11 Lost My Baby" by Ray French earlier?

12 A. Yes.

13 Q. Does that song combine the I-iii-IV-V chord progression
14 with anticipated second and fourth chords?

15 A. Yes, as I performed and explained.

16 Q. And when was that song released?

17 A. 1966.

18 Q. In addition to combining the chord progression and the
19 harmonic rhythm at issue, does "Since I Lost My Baby" contain
20 any melodic similarity to the "Let's Get It On" or "Thinking
21 Out Loud"?

22 A. Yes, the descending.

23 Q. That's what you demonstrated to us earlier, correct?

24 A. That's correct.

25 Q. In what key is "Since I Lost My Baby"?

N52HGri2

1 A. It's in the key of E, which is a half step above E flat.
2 That is the key of "Let's Get It On." So the relationship is
3 the same as the relationship with the TOL, which is a half step
4 below E flat. So TOL in key to LGO is essentially the same as
5 the 1966 Ray French in key to LGO.

6 Q. Dr. Ferrara, we looked at charts and crossed out musical
7 transcriptions for the previous song "You Lost the Sweetest
8 Boy." Did you prepare similar charts and transcriptions for
9 "Since I Lost My Baby"?

10 A. Yes, I did.

11 Q. And if we were to go through the same exercise for "Since I
12 Lost My Baby" and if you were to play the chords and the
13 harmonic rhythm of that song on the piano, would it show the
14 same thing with respect to the chord progressions and harmonic
15 anticipation as in "You Lost the Sweetest Boy"?

16 A. It would. It would show that, once you made that
17 comparison, that no chords remain in TOL that aren't in, in
18 this case, "Since I Lost My Baby" or that are not shared with
19 LGO.

20 Q. Are you familiar with the song called "Georgy Girls" by 101
21 Strings Orchestra?

22 A. Yes.

23 Q. Does that song combine the I-iii-IV-V chord progression
24 with anticipated second and fourth chords?

25 A. Yes, it does.

N52HGri2

1 Q. When was that song released?

2 A. Song was released in 1967 by 101 Strings.

3 Q. Are there other versions of "Georgy Girl" recorded by
4 others that also use the same chords and anticipate the second
5 and fourth chords?

6 A. Yes. The Boston Pops also had in the following year, 1968,
7 their own arrangement of the same song, "Georgy Girl," and it
8 was in fact in E flat, the same key as "Let's Get It On." So
9 that was five years, 1968, five years before "Let's Get It On,"
10 and there is also The Seekers version in 1967. 1967, I have to
11 say, that the bass part doesn't include the anticipation. It's
12 on the beats, but the guitar part anticipates the notes. So
13 (piano played).

14 The vocal melody and the — and the guitar part do
15 anticipate, whereas in the other two versions, the 101 Strings
16 and the Boston Pops, they're dead on. They have the same chord
17 progression and the same anticipation in a much more full way.

18 Q. Dr. Stewart testified that "Georgy Girl" supposedly sounds
19 nothing like "Let's Get It On" or "Thinking Out Loud." Do you
20 have a response to that?

21 A. First of all, it doesn't matter whether it sounds alike.
22 The key here for a musicologist is, to the extent that you're
23 saying that someone has copied expression from your work and
24 you believe that you have some level of ownership thereof, the
25 key is are there other works, in this case, that predate LGO

N52HGri2

1 that embody that same expression? That's what counts. Whether
2 it's written for a symphony orchestra or for a rock band, a
3 musicologist moves into the underlying music and ultimately
4 shows empirically whether or not that expression is in the
5 earlier works.

6 And of course, the other point that I guess makes this
7 moot is that the deposit copy in LGO is sheet music. It's not
8 a sound recording, it's sheet music.

9 Q. Dr. Ferrara, we looked at charts and crossed out musical
10 transcriptions for "You Lost the Sweetest Boy." Did you
11 prepare similar charts and transcriptions for "Georgy Girl"?

12 A. Yes.

13 Q. If we were to go through the same exercise for "Georgy
14 Girl" and if you were to play the chords and the harmonic
15 rhythm of "Georgy Girl" at the piano, would it show the same
16 thing with the respect to the chord progression and harmonic
17 anticipation as "You in Lost the Sweetest Boy"?

18 A. Yes, all of the chords in TOL would be X'd out.

19 Q. Let's move on to the next song.

20 Are you familiar with a song called "I've Got Love on
21 My Mind" by Natalie Cole?

22 A. Yes.

23 Q. Do you recall when that song was released?

24 A. 1977.

25 Q. Does that song combine the I-iii-IV-V chord progression

N52HGri2

1 with anticipated second and fourth chords?

2 A. Yes, it does.

3 Q. And in addition to combining the chord progression and the
4 harmonic rhythm at issue, does "I've Got Love on My Mind"
5 include melodic similarity to "Let's Get It On" or "Thinking
6 Out Loud"?

7 A. It does.

8 Q. What is the key of "I've Got Love on My Mind"?

9 A. It's in the key of D major, the same key as TOL.

10 Q. Dr. Ferrara, we looked at charts and crossed out musical
11 transcriptions for the previous songs. Did you prepare similar
12 charts and transcriptions for "I've Got Love on My Mind"?

13 A. Yes, I did.

14 Q. And if we went through the same exercise that we've been
15 talking about, would it show the same thing with respect to the
16 chord progression and harmonic anticipation as in "You Lost the
17 Sweetest Boy"?

18 A. Yes. Once again all of the chords in TOL would be X'd out.

19 Q. Could you please perform the chord progression and harmonic
20 rhythm from "I've Got Love on My Mind" followed by the chord
21 progression and harmonic rhythm from "Let's Get It On."

22 A. Yes. Here it is, both in the key of D in "I've Got Love on
23 My Mind" (piano played). The basic chord progression, that is
24 the same.

25 Q. You also mentioned melodic similarity to "Let's Get It On"

N52HGri2

1 or "Thinking Out Loud." What melodic similarity did you find?

2 A. After three iterations of that I-iii-IV-V chord

3 progression, the basic I-iii-IV-V chord progression, it moves

4 to blue notes. So starting at the beginning, if you look right

5 here, *I've got love on my mind*, the title lyric, that's the

6 four-bar chord progression that repeats, it repeats again, and

7 then all of a sudden we go to these blue notes, and there's

8 nothing particularly wrong.

9 So we start with the chord progression and melody

10 (piano played), and that was three times. Now listen, there's

11 blues. Da da da da, that's lowered, 3 to 2 (vocalizing) that's

12 LGO. This is Natalie Cole (piano played). This is after LGO.

13 Many years before TOL, 1977, but after 1973. The key is that

14 these similarities are not meaningful. They're simply using a

15 common chord progression with a common anticipation, harmonic

16 rhythm and, in this case, moving into some blue notes. These

17 are blue notes that have been used for decades in countless

18 songs.

19 Q. Dr. Ferrara, did you find any songs that combined the basic

20 I-I/3-IV-V chord progression in "Thinking Out Loud" with

21 anticipated second and fourth chords?

22 A. Yes.

23 Q. And how many did you find?

24 A. Two. One before LGO and one after.

25 Q. And could you name those songs for us?

N52HGri2

1 A. Yes. We just saw it on the screen. This is 1962 by The
2 Contours, "Do You Love Me".

3 Q. And when was "Do You Love Me" released?

4 A. 1962.

5 Q. And what was the second song that you found?

6 A. "Six-Pack Summer." That's by Phil Vassar, and that's
7 released in 2000.

8 Q. Dr. Ferrara, we looked at charts and crossed out musical
9 transcriptions for "You Lost the Sweetest Boy." Did you
10 prepare similar charts and transcriptions for these songs as
11 well?

12 A. Yes, I did.

13 Q. If we were to go through the same exercise for "Do You Love
14 Me" in "Six-Pack Summer," would it show the same thing with
15 respect to the chord progression and harmonic anticipation?

16 A. Yes. Once again, in both cases, in "Do You Love Me" and
17 "Six-Pack Summer," all of the chords in TOL would be X'd out.

18 Q. Could you please demonstrate the chord progressions from
19 "Do You Love Me" followed by "Six-Pack Summer" followed by
20 "Thinking Out Loud" on the piano.

21 A. Yes, I'll put them all in D. So "Do You Love Me" (piano
22 played). "Six Pack" (piano played). "Thinking Out Loud"
23 (piano played).

24 Q. Dr. Ferrara, we've now gone through a number of songs that
25 feature the same combination of the basic chords in "Let's Get

N52HGri2

1 It On" and "Thinking Out Loud" and anticipation on the second
2 and fourth chords, some of which also included some limited
3 melodic similarity to "Let's Get It On" and "Thinking Out
4 Loud."

5 From a musicological perspective, what is the
6 significance, if any, of these songs that combine these
7 elements together?

8 A. With some of them it shows that this combination was not
9 first in LGO; that, in fact, there were songs that predate LGO
10 that use the combination, including, for example, the Mary
11 Wells, the 1963 "You Lost the Sweetest Boy" that also have
12 melodic similarities at issue. So that is significant because
13 it establishes that LGO was not the first with respect to this
14 combination and including some of the melodic similarities that
15 have been thrown in here by Dr. Stewart.

16 In addition, it continues to undermine the claim of
17 copying because it shows that, even before LGO, writers put
18 these basic elements that are out there and commonplace
19 together. It really undermines this claim of copying.

20 Q. Using Dr. Stewart's logic, do you believe that "Let's Get
21 It On" copied from "You Lost the Sweetest Boy" or any of these
22 other prior songs?

23 A. No, and I hope I made that clear. It is not my opinion
24 that "Let's Get It On" copied these elements at issue from the
25 songs that precede the creation of LGO.

N52HGri2

1 Q. Why is that?

2 A. For the same reason I just mentioned a moment ago, and that
3 is we're talking about commonplace elements that multiple
4 writers have put together.

5 Q. I'd like to draw your attention back to Defendant's
6 Exhibit 210. And if you look at the final entry on page 5, I'd
7 like to draw your attention to a song called "Better Than Me."
8 Who authored that song?

9 A. As you can see, Pete Riley and Amy Wadge.

10 Q. And do you know when "Better Than Me" was released?

11 A. My understanding is that it was released in 2012. As you
12 can see, there may be a 2013 other version of it, but certainly
13 before the writing of TOL in 2014.

14 Q. What is the chord progression in "Better Than Me"?

15 A. It's the same chord progression as in TOL. It's I — these
16 are Roman numerals — I-I/3-IV-V, yes.

17 Q. And does "Better Than Me" also feature anticipated chords?

18 A. It does. The second, third, and fourth chords of the
19 four-chord progression I just cited are anticipated in "Better
20 Than Me."

21 Q. So what is the difference between the harmonic rhythm in
22 "Thinking Out Loud" and "Better Than Me"?

23 A. It's just one more chord anticipated, the third chord,
24 which is, of course, the third chord of the four-chord
25 progression, which is that IV. So there are three anticipated

N52HGri2

1 chords in "Better Than Me," the second, third, and fourth
2 chords. There are two anticipated chords in TOL, the second
3 and fourth chord.

4 Q. Do you find that to be a significant difference?

5 A. It is not.

6 Q. What is the significance, if any, of "Better Than Me" to
7 your analysis here?

8 A. It shows that this chord progression and this kind of
9 anticipation was part of the writing of Amy Wadge before she
10 joined with Ed Sheeran to create "Thinking Out Loud."

11 Q. And so how does that impact your opinion about whether
12 "Thinking Out Loud" copies from "Let's Get It On"?

13 A. It further undermines the claim of copying.

14 Q. I'd like to discuss Van Morrison, who Mr. Sheeran
15 identified as one of his musical influences. Mr. Sheeran also
16 mentioned some specific songs during his testimony. He
17 mentioned "Crazy Love," "Tupelo Honey," "Have I Told You
18 Lately," and "Why Must I Always Explain."

19 In assessing "Let's Get It On" and "Thinking Out
20 Loud," did you analyze the works of Van Morrison?

21 A. Yes, I did.

22 Q. Broadly speaking, what did you find?

23 A. I found that in some cases there were both harmonic and
24 melodic similarities to works by Van Morrison and TOL,
25 including some of the expression that's at issue now. And in

N52HGri2

1 two cases, "Crazy Love" and "Tupelo Honey," those were works
2 released by Van Morrison before the creation of LGO.

3 Q. Can you please take a look at what's been marked for
4 identification as Defendant's Exhibit 213A.

5 Do you recognize this?

6 A. Yes. It begins with the published sheet music of "Crazy
7 Love." Would you like me to —

8 Q. If you can just identify what's in the document.

9 A. OK. The next is "Tupelo Honey." This is all published
10 sheet music. Next is "Checking It Out." These are all Van
11 Morrison songs, published sheet music. "Tore Down a la
12 Rimbaud", "Have I Told You Lately."

13 MS. FARKAS: Your Honor, I'd like to move
14 Exhibits 213A into evidence, please.

15 MR. FRANK: We'd stipulate to all of the sheet music
16 they're attempting to put in. No objection, your Honor.

17 THE COURT: Received.

18 MS. FARKAS: Mr. Frank, does that apply to 213B as
19 well.

20 MR. FRANK: Yes, all of the ones under the
21 subheadings.

22 MS. FARKAS: Thank you.

23 (Defendant's Exhibits 213A and 213B received in
24 evidence)

25 BY MS. FARKAS:

N52HGri2

1 Q. I want to direct your attention to 213B just for a moment.
2 Can you identify that for us?

3 A. Yes. This is another Van Morrison song, 1991, "Why Must I
4 Always Explain," and this is not published sheet music. What
5 you see on this first page is my transcription of the opening
6 introduction, melody, and chords, and the verse, melody, and
7 chords. This is in the key of G.

8 On the next page, the final page of 213B, you'll see
9 the same transcription but now transposed to the key of D so
10 that it can be compared with the works at issue.

11 Q. OK. Let's talk about "Crazy Love." What did you find
12 significant about "Crazy Love"?

13 A. Well, both similarities in the chord progression and in the
14 melody.

15 Q. Can you describe to us what the chord progression is,
16 please.

17 A. The chord progression in "Crazy Love" is I-iii-IV-I. So in
18 an LGO it's I-iii-IV-V (piano played).

19 In "Crazy Love," it's I-iii-IV, but then it goes back
20 down to I. That chord progression continues through all of the
21 verses. And very important, at the end — after the verses, we
22 have a chorus. Listen to the chord progression and the melody.
23 In fact, this is the famous chorus, *She gives me, love, love,*
24 *love, love, crazy love* (piano played), and it continues (piano
25 played).

N52HGri2

1 And I want to call your attention to that first set of
2 descending chords on love, love, love (piano played). And
3 remind you of this (piano played). That's TOL. That's the end
4 of the chorus of TOL (piano played). Chorus "Crazy Love"
5 (piano played).

6 The melody is very close, in the key of D, scale
7 degree 3, 3, 2, 1, and then moving down and then back up,
8 that's "Crazy Love" (piano played). And what we have, of
9 course, in TOL is (piano played). So instead of moving down to
10 B, we move down to A (piano played).

11 So there is a real similarity in the melody, not just
12 the pitches, the contour, but also the melodic rhythms, quarter
13 notes that are descending, but of course the idea of having in
14 the chorus and ultimately ending the chorus with descending
15 chords is clearly very similar, so (piano played).

16 That's TOL (piano played). "Crazy Love," it continues
17 (piano played). When you put that together with something
18 else, and then I'll stop, when you put that together with this,
19 this is now the — I think it's the fourth melodic phrase in
20 the verses. Let's listen to this melody (piano played).

21 Again (piano played) 3, 5, 6, 5, 5, 3. What's the
22 opening of TOL? (Piano played). So there is a real melodic
23 similarity. There's a slight melodic rhythm similarity; that
24 is, we have short, short, long. That's "Crazy Love," short,
25 short, long. But otherwise, it's not a meaningful similarity.

N52HGri2

1 Why? Because "Crazy Love" is based on pentatonic, and nobody
2 owns pentatonic. And moving from 3 to 5 to 6, 5 to 3 is kind
3 of a natural and expected thing when you're in a pentatonic
4 mode.

5 So the point is that, yes, there are similarities of
6 basic chord progression that is different with respect to the
7 last chord and, of course, the second chord is the same as LGO.
8 This is "Crazy Love," 1970, three years before "Let's Get It
9 On," three years before LGO. So you have this aggregate of
10 similarities in the chord progression and, of course, in the
11 melody and then in this final chord progression (piano played).
12 You put all that together, and we have a similarity that is not
13 enjoyed to this extent with melody and chords and in this
14 descending chord progression between LGO and TOL.

15 Q. I think you may have answered this already, but are you
16 suggesting that Ed Sheeran copied from "Crazy Love"?

17 A. Not at all. Once again, descending chord progressions are
18 something that is a commonplace idea. No one owns it. And,
19 again, the use of the pentatonic and even (piano played), it's
20 such a natural way to play this pentatonic scale and the use of
21 a I-iii-IV-I chord progression, none of those things in and of
22 themselves would suggest that Ed Sheeran copied from Van
23 Morrison.

24 Q. I'd like to direct your attention to Dr. Stewart's
25 testimony regarding "Crazy Love" and slide 83 from his

N52HGri2

1 presentation.

2 Could you please briefly respond to Dr. Stewart's
3 analysis about "Crazy Love."

4 A. Once again, if you pardon the expression, this is a failure
5 of omission, or a failure by omission, that's more proper. And
6 what do I mean by that? Remember I mentioned that the third or
7 fourth phrase in "Crazy Love" is *where we go* (piano played).
8 Well, that's omitted. Dr. Stewart's only put in the first two
9 phrases. What Dr. Stewart has put into that, into that slide,
10 is simply the chord progression (piano played), but what he's
11 left out is not only this (piano played), that melody, but he's
12 also left out the amazing (piano played) that's "Crazy Love."
13 And it's not in Dr. Stewart's slide, so that's a failure of
14 omission and by omission.

15 Q. Do you find it significant that "Crazy Love's" fourth chord
16 is different from TOL and LGO?

17 A. It's not a significant difference in and of itself.

18 Q. Let's move on to the next song. What do you find
19 significant about "Tupelo Honey"?

20 THE COURT: Ms. Farkas, could you come up for a
21 minute.

22 MS. FARKAS: Sure.

23 (Continued on next page)

N52HGri2

(At sidebar)

THE COURT: I'm not saying that it doesn't add something in each instance, but I'm getting a little worried about accumulation and Rule 403.

MS. FARKAS: So, your Honor —

THE COURT: How much more — how many more of these examples of what is essentially the same point do you have?

MS. FARKAS: So I hear you. The difference is I have about two or three more examples, but I can do one more and wrap up the other two without doing the examples. It was because we moved on to Van Morrison as opposed to the other ones who Mr. Sheeran has said is an influence. So it's a bit —

THE COURT: Excuse me.

MS. FARKAS: We moved on to Van Morrison songs, which is a variation on the theme because of Mr. Sheeran's testimony that Van Morrison was a significant influence on him.

THE COURT: Yes.

MS. FARKAS: But I can try to expedite the conclusion. I am almost done.

THE COURT: I think —

MS. FARKAS: And I will do what I can do to get done faster than I was planning on getting done.

THE COURT: You will have my full support.

MS. FARKAS: Well, then I hear you loud and clear.

N52HGri2

(In open court; jurors present)

THE COURT: Everybody needs a break. Ms. Farkas is almost finished. Would you like to take a break now?

JUROR: Please.

THE COURT: Or can you wait until she finishes?

THE DEPUTY CLERK: No.

THE COURT: OK. Right now.

JUROR: Thank you.

(Recess)

(Continued next page)

N521GRI3

Ferrara - Direct

(In open court; jury present)

BY MS. FARKAS:

Q. I'd like to talk to you briefly about "Tupelo Honey" by Van Morrison. What did you find significant about "Tupelo Honey"?

A. "Tupelo Honey" was released in 1972, one year before LGO. It includes the I-iii-IV-I chord progression that was in "Crazy Love," but it also includes a I-iii-IV-V progression. Of course that is the chord progression in LGO. The fourth chord is anticipated in that chord progression. Whether it's the I chord or the V chord, it's always anticipated. And the opening three pitches are the iii-V-VI opening three pitches in "Thinking Out Loud."

Q. Let's talk about the next Van Morrison song called "Tore Down a la Rimbaud." What, if anything, did you find significant about this song?

A. As you can see, this was released in 1984, after LGO but many years before TOL. The introduction features the LGO chords, the verses feature the TOL chords; and with respect to anticipation, the introduction includes the LGO chords and anticipated second and fourth chords.

Q. Dr. Ferrara, during their testimony, Ed Sheeran and Amy Wadge both testified that the Van Morrison song "Have I Told You Lately" features the same chords as "Thinking Out Loud;" is that correct?

A. Yes, it is correct.

N521GRI3

Ferrara - Direct

1 Q. Last one. I'd like to direct your attention to another Van
2 Morrison song called "Why Must I Always Explain?" Can you tell
3 us what's significant with that song.

4 A. Yes. "Why Must I Always Explain?" was released in 1991,
5 and it alternates between the "Crazy Love" chords, and that, of
6 course, is the I-iii-IV-I, the LGO chords, the I-iii-IV-V, and
7 the TOL chords, the I-I/3-IV-V, and it also includes the
8 stepwise descending chord progression, and that is, of course,
9 similar to the one in "Thinking Out Loud" that we went through
10 in my testimony. As you can see, with respect to anticipation,
11 "Why Must I Always Explain?," in those chord progressions I
12 just specified, the second and fourth chords are anticipated;
13 and also, here again, the opening pitches in fact, there are
14 several opening pitches that line up with the opening pitches
15 of TOL, and indeed they are more similar to the opening pitches
16 in "Thinking Out Loud" than the opening pitches between
17 "Thinking Out Loud" and LGO.

18 Q. Overall, what do you find significant about the Van
19 Morrison prior art that we have looked at?

20 A. The Van Morrison prior art establishes that whether in his
21 two works that predate LGO or the other works that are between
22 the release of LGO and TOL, in both cases, they show that it's
23 not remarkable that a great writer like Van Morrison, a great
24 writer like Ed Sheeran, would take these otherwise commonplace
25 elements and put them together and make them into a great piece

N521GRI3

Ferrara - Direct

1 of music. The underlying elements, though, are commonplace,
2 and I take that away from the Van Morrison songs.

3 Q. And how does that affect your opinion about whether or not
4 "Thinking Out Loud" copies from "Let's Get It On"?

5 A. It continues to undermine the claim of copying.

6 Q. Let's turn now briefly to the lyrics of each song.

7 From a musicological perspective, generally speaking,
8 what importance do you place on lyrics?

9 A. Lyrics are significant.

10 Q. Did you find any meaningful similarities between the lyrics
11 in "Let's Get It On" and "Thinking Out Loud"?

12 A. No, I did not.

13 Q. Let's turn to song structure.

14 During his trial testimony, did Dr. Stewart adopt your
15 analysis regarding the song structures of both songs?

16 A. Dr. Stewart showed my structural analysis and appeared to
17 adopt it during his testimony.

18 Q. Did you find any significant structural similarities
19 between "Let's Get It On" and "Thinking Out Loud"?

20 A. None at all.

21 Q. I'd like to direct your attention to Dr. Stewart's
22 testimony regarding the YouTube video of Ed Sheeran singing
23 some of the lyrics of "Let's Get It On" over the chords of
24 "Thinking Out Loud." Have you seen that video?

25 A. Yes, I have.

N521GRI3

Ferrara - Direct

1 Q. And do you find that video significant?

2 A. No.

3 Q. Is it common for performers to do medleys or mashups or
4 interpolations?

5 A. Yes.

6 Q. In his performance did Mr. Sheeran alter any of the lyrics
7 of "Thinking Out Loud"?

8 A. No.

9 Q. What chords is Mr. Sheeran playing while he's singing some
10 of the lyrics to "Let's Get It On"?

11 A. He's playing the same I-I/3-IV-V chord progression that's
12 at issue in "Let's Get It On." He continues to play that chord
13 progression under the LGO lyric.

14 Q. You identified the I-I/3-IV-V chord progression. That's
15 the chord progression in "Thinking Out Loud," correct?

16 A. Exactly.

17 Q. And so when you just said earlier, I think you misspoke
18 when you identified that as the chord progression of "Let's Get
19 It On."

20 A. If I said that, I misspoke to be sure.

21 Q. When Mr. Sheeran starts singing the lyrics to "Let's Get It
22 On" in that video, does he sing those lyrics to the LGO vocal
23 melody or to the TOL vocal melody?

24 A. To the LGO vocal melody.

25 Q. And so the melody that Mr. Sheeran is singing changes,

N521GRI3

Ferrara - Cross

1 correct?

2 A. It changes from the TOL melody to the LGO melody.

3 Q. And does it correspond to Melody C that Dr. Stewart has
4 placed in issue?

5 A. It does.

6 Q. Dr. Stewart testified that he found it significant that
7 Mr. Sheeran segued from TOL to the lyrics of LGO, back to TOL.
8 Do you find that significant?

9 A. No.

10 Q. Dr. Ferrara, before we conclude, I just have a few more
11 questions.

12 Did you analyze "Let's Get It On" and "Thinking Out
13 Loud" in their entirety?

14 A. Yes, I did.

15 Q. And briefly, what is your overall conclusion in this case?

16 A. I found no musicological evidence of copying. I found no
17 significant similarities.

18 Q. Can students at the NYU Steinhardt School major in
19 songwriting?

20 A. Yes, we have a bachelor's and a master's program in
21 songwriting.

22 Q. And if the plaintiffs are awarded ownership of the chord
23 progression at issue, coupled with the rhythm at which the
24 chords are performed, how, if at all, would that affect the
25 songwriting majors at Steinhardt?

N521GRI3

Ferrara - Cross

1 MR. FRANK: Objection. Calls for speculation. And
2 also relevance.

3 THE COURT: Sustained.

4 MS. FARKAS: No further questions at this time.

5 MR. FRANK: May it please the Court.

6 CROSS EXAMINATION

7 BY MR. FRANK:

8 Q. Dr. Ferrara, I want to thank you for being here today, and
9 I hope you'll indulge me and be patient, as my musical
10 knowledge probably is not on par with yours.

11 First question I wanted to ask you, just so we're
12 clear for the record, you seem to place a lot of emphasis —

13 A. Could you speak closer to the microphone.

14 Q. I apologize. Can you hear me okay now?

15 A. I can.

16 Q. One of the items that you analyzed in connection with the
17 analysis that you provided for us here today is the
18 commercially available sheet music for "Thinking Out Loud,"
19 correct?

20 A. I analyzed that early on before Judge Stanton's order, but
21 with respect to the deposit copy.

22 Q. I understand. So is that a yes?

23 A. Yes, I —

24 Q. Thank you.

25 A. — said that I did, yes.

N521GRI3

Ferrara - Cross

1 Q. And would you agree with me that the analysis that is at
2 issue in this case for purpose of the jury's determination is
3 the similarities between the studio recording of "Thinking Out
4 Loud" and the deposit copy of "Let's Get It On"? Would you
5 agree with that?

6 A. Yes, the — what is at issue is the composition embodied in
7 the TOL sound recording and the deposit copy of LGO.

8 Q. Thank you. I want to take the opportunity, Dr. Ferrara, to
9 see if we might revisit a few items that were listed with
10 respect to your pedigree and background.

11 First off, I wanted to know, are you currently an
12 active — actively participating musician? Do you do gigs
13 around town or play anywhere?

14 A. I do not do gigs around town, no.

15 Q. Was there ever a time where you did do that?

16 A. Yes. In fact, starting when I was 14, having moved out of
17 Brooklyn to New Jersey, I got into bands; worked my way through
18 college right into and through a PhD playing in bands, playing,
19 obviously, popular music.

20 Q. Did you ever have occasion to play, just by way of
21 illustration, a bar mitzvah or wedding, the general sort of gig
22 circuit?

23 A. Yes.

24 Q. You did. Did you ever have occasion to play "Let's Get It
25 On" at any one of these gigs?

N521GRI3

Ferrara - Cross

1 A. I don't recall ever playing that, no.

2 Q. Did you ever have occasion to play any medleys in
3 connection with any of these gigs that you played a number of
4 years ago?

5 A. Certainly medleys; not of the songs at issue, needless to
6 say, but certainly medleys.

7 Q. Okay. And when was the last time you actively were
8 performing as a musician?

9 A. I stopped band playing back in the early '80s, I guess, but
10 I continued — I'm also a pianist and I have accompanied some
11 great singers, and I continued accompanying singers well into
12 the late '90s, and I also continued giving in some cases solo
13 recitals at the piano well into the 1990s.

14 Q. Okay. So would it be fair to say that you haven't
15 performed as a musician for maybe in excess of 20 years?

16 A. I — I would qualify that by saying that I perform for my
17 students in classes all the time. I use the piano as, you
18 know, as a tool, and so —

19 Q. Sure.

20 A. — with that qualification, the answer would be, I don't
21 continue to perform as a professional pianist outside of the
22 classroom.

23 Q. Thank you.

24 Now I wanted to clarify with respect to the portion of
25 your CV that addresses publications. It looks like, if I

N521GRI3

Ferrara - Cross

1 understand correctly, that the last book you actually published
2 was 2005; is that correct?

3 A. That's correct. That's per my testimony.

4 Q. And the — but it listed on the CV that the book was
5 actually a fourth edition, was it not?

6 A. No. Fourth edition was 1993, fifth edition was 2005, which
7 is exactly what I said in my testimony.

8 Q. So the 2005 was actually a new book —

9 A. 2005 — I'm sorry. Go ahead.

10 Q. I'm sorry. Was that a new book that you published in 2005?

11 A. 2005 was a fifth edition with change of chapter, and what
12 we did, Roger Phelps and I were co-writers of the fourth
13 edition and — and the fifth edition. And I had two junior
14 colleagues at the time at Steinhardt, and we asked them to
15 co-write a single chapter on technology and research, and so
16 that — that's essentially what that fifth edition was about.

17 Q. I understand. Could you tell us when the first edition was
18 actually written.

19 A. First edition goes way back. It was Roger Phelps's own
20 edition. So Roger is an institution in — in research
21 methodology. He wrote a first, second, and third edition solo.
22 He asked me to co-author the fourth edition. We also asked
23 another scholar, Thomas Goolsby, to also add a chapter, and
24 then again in the fifth edition, he asked me to — to co-write
25 the fifth edition with him, and I suggested those two junior

N521GRI3

Ferrara - Cross

1 colleagues to do that additional chapter.

2 Q. And I appreciate that, Dr. Ferrara, but I think my original
3 question was: When did you write the first edition of the
4 book?

5 A. I don't remember. I don't know when the first edition of
6 the book — as I tried to state, Roger Phelps is the sole
7 author of the first, second, and third editions of that book.

8 Q. Can you specify for us when was the last time you published
9 a book of new material?

10 A. Well, 2005.

11 Q. That was — that — you said that was a fourth or fifth
12 edition and it had some changes.

13 A. Yes.

14 Q. But it wasn't a completely new —

15 A. Oh, it wasn't —

16 Q. — iteration, was it?

17 A. As fifth and fourth editions aren't as well. There is —
18 there are changes in the fifth edition as compared to the
19 fourth. The fourth was quite a bit different than — than
20 Roger Phelps's third edition, so the fourth is really largely
21 fresh cloth. The fifth edition, I think your implication is
22 correct that there's certainly material that was left over from
23 the fourth edition in the fifth edition, which one expects.

24 Q. Do you have occasion, in connection with your research and
25 work, to go to conventions with colleagues and deliver

N521GRI3

Ferrara - Cross

1 presentations?

2 A. I — I do. I'm particularly active in the greater New York
3 chapter of the American Musicological Society. By the way, the
4 American Musicological Society is housed at New York
5 University, and so presenting at that chapter is — is rather
6 significant for me, and I noted that I've done five
7 peer-reviewed papers there since 2013. But to answer your
8 question even more specifically, I don't tend to go to national
9 conventions, and I'll be happy to tell you why.

10 Q. I think I know why, Dr. Ferrara. I read a deposition
11 recently, I'll represent to you, in a case that said you don't
12 like to travel; is that correct?

13 A. That was during COVID.

14 Q. Right.

15 A. You put that in perspective. That is exactly right. Like
16 many, I was very concerned about traveling during COVID.

17 Q. Could you share with the Court how — I don't think you
18 spoke to this in your direct testimony — how you initially got
19 into the field of musicological consulting.

20 A. Well, I had already published in the '80s works in music
21 analysis; and in the early '90s, probably by 1991, I was asked
22 if I could complete an analysis with respect to a music
23 copyright matter. Soon after that, probably by 1992, I became
24 involved as Andrew Lloyd Weber's musicologist, and in 1998, I
25 was his musicologist at trial in this Southern District of New

N521GRI3

Ferrara - Cross

1 York with respect to the *Phantom of the Opera* trial. So that's
2 essentially how I came into this area.

3 Q. That was your first involvement in litigation or
4 consulting?

5 A. No. I believe that between 1992 and 1998, there were other
6 litigations, but no other trials.

7 Q. Now you represented in your initial testimony on direct
8 that you have worked for both plaintiffs and defendants in the
9 past; is that correct?

10 A. That's correct.

11 Q. Could you share with the Court some of the cases over the
12 last five years that you served in the capacity of a musical —
13 musicological consultant for plaintiffs.

14 A. In the last five years, no published, and by published I
15 mean no copyright litigations that were actually filed. Before
16 that, needless to say, yes, but in the last five years, I have
17 done any number of analyses for potential plaintiffs — that
18 is, for parties who intend to make a claim, and in some cases
19 those things were settled and so no published reports would be
20 available. But I certainly have worked on behalf of plaintiffs
21 and potential plaintiffs in the last five years; indeed, in
22 every year in the last five years.

23 Q. What about unpublished reports? Who did you work for? Who
24 retained you to provide a report?

25 A. Those would be confidential.

N521GRI3

Ferrara - Cross

1 Q. On what basis would you claim that they would be
2 confidential?

3 A. To the extent that — that I had — I was the consultant.
4 Difference between a consultant and an expert witness is that a
5 consultant does not have to be and in fact is not proffered to
6 the other side. When you're an expert witness, you must be
7 identified. We're talking about then potential plaintiff's
8 cases that were early on settled, or they just walked away, in
9 which case I was not identified. To that extent, that — that
10 work would be confidential.

11 Q. I understand that, Dr. Ferrara, but respectfully, you're
12 not a CPA, a priest, or a lawyer, so could you identify what
13 particular privilege you're asserting in not answering my
14 question.

15 MS. FARKAS: Objection, your Honor.

16 THE COURT: Sustained. It's in the Federal Rules of
17 Civil Procedure.

18 Q. Could you tell us how many times that you have served as a
19 consultant for a defendant in the past five years.

20 A. I would say that on average, I provide a report probably
21 two to three times a year for a potential defendant, and so
22 over the last five years, 10 to 15 reports would certainly be
23 reasonable.

24 Q. And I think you gave us a list of some of the individuals
25 and entities that you've worked for in the past in your direct

N521GRI3

Ferrara - Cross

1 testimony. But I also believe at the onset of your testimony
2 yesterday you had occasion to say that you've represented
3 clients in the past and you've given them some bad news, told
4 them that there was an infringement, but they were actually
5 happy about it, because you were truthful with them, and they
6 came back to you. Do you recall that testimony?

7 A. I do. They weren't happy with the bad news, but —

8 Q. Could you tell us, share with the Court to whom you gave
9 news that they infringed and they actually came back to you?

10 MS. FARKAS: Objection, your Honor.

11 A. I think that — sorry.

12 Q. I'll withdraw the question.

13 For the record, could you tell us about some of the
14 parties that you have told had committed infringement in the
15 past five years. Have you ever actually made a positive
16 finding of infringement?

17 A. I think there is an objection.

18 MR. FRANK: Yes, there is.

19 MS. FARKAS: I was waiting. Objection, your Honor.

20 THE COURT: Would you repeat the question.

21 MR. FRANK: Certainly.

22 THE COURT: I understand you withdrew the earlier one.

23 MR. FRANK: I did, your Honor, and I apologize. I
24 should have waited until you were finished.

25 THE COURT: Yeah.

N521GRI3

Ferrara - Cross

1 BY MR. FRANK:

2 Q. For the record, the question was: Could you tell us about
3 some of the parties that you have told had committed
4 infringement in the past five years.

5 MS. FARKAS: Objection. Irrelevant, outside the scope
6 of this expert's testimony. He is not a lawyer. I'll stop
7 there.

8 MR. FRANK: Respectfully, he's here to provide a
9 musicological opinion, and I believe his specific testimony
10 yesterday is, you should believe him because he is here for the
11 music, and an arbiter of the music, arbiter, neutral arbiter,
12 so what — I'm trying to probe whether or not he actually is in
13 fact neutral.

14 MS. FARKAS: It's outside Rule 26, your Honor.

15 THE COURT: He's not required to answer the question.
16 He may if he wishes.

17 BY MR. FRANK:

18 Q. Dr. Ferrara, would you like to answer my question as to
19 when you have found infringement on behalf of your clients in
20 the past five years? Would you like to take my invitation to
21 respond to that?

22 MS. FARKAS: Objection to form. Lacks foundation.

23 Q. Are you willing to give that information?

24 THE COURT: Doctor, you heard my ruling. Just follow
25 that and forget his interpretation.

N521GRI3

Ferrara - Cross

1 THE WITNESS: Thank you. Thank you.

2 MR. FRANK: Fair enough.

3 A. So the answer is essentially the same. If a potential
4 plaintiff — be specific now, because you've actually earlier
5 misrepresented my testimony earlier. So why don't you restate
6 the question so I'm quite clear as to which parties you're
7 asking about.

8 Q. Absolutely. Has there ever been an instance in the past
9 five years that a party has come to you for professional
10 assistance and you have said that they committed infringement?

11 A. You're saying that that party committed an infringement?

12 Q. Well, they asked you for an opinion about whether they had
13 infringed.

14 A. You're not being clear, so let's make it clear.

15 Q. Please.

16 A. Okay. Are you asking whether a potential plaintiff — and
17 this is something that I mentioned early on in my testimony
18 yesterday. So if you're asking did a potential plaintiff
19 provide materials to you and did you say to that plaintiff,
20 yes, I believe you have musicological evidence to support your
21 claim —

22 Q. Actually, you raise a good point, Dr. Ferrara.

23 A. That's what I want to know. Is that what you're asking?

24 Q. I'm speaking directly with regard to a prospective
25 defendant who's been accused of infringing who came to you and

N521GRI3

Ferrara - Cross

1 asked you for an analysis to determine whether or not they had
2 infringed or not. Have you in the past five years told someone
3 of that ilk that there is evidence to support the infringement?
4 A. Many, many, many times. And the point is, as I made before
5 — it's twofold. In these instances, I am a consultant, and my
6 understanding under Rule 26 is that as a consultant, all that
7 is going on between that party and I is confidential. Once I
8 become an expert witness, that is quite a different story.

9 But I will tell you — I'll give you an example. Just
10 about a year ago — and again, there are just so many of these
11 examples — a major publisher in Nashville, one of the, you
12 know, the national major publishers, and their office is in
13 Nashville, I was sent a work that received a claim — not a
14 complaint, just a letter claim saying, we believe that your
15 work, your song, has infringed our work. That publisher sent
16 it to me, and I did a lot of work on it, and I said, I do
17 believe there's musicological evidence of copying and I
18 strongly recommend that you settle the case. I do that very
19 frequently, and there's no question that that is why the motion
20 picture companies and the publishers and the labels come to me,
21 because they know I'm going to give them an honest opinion,
22 even when it's bad news. They're never happy, contrary to what
23 you — what you conflated earlier. They're never happy to get
24 bad news, but they appreciate it.

25 Q. I see. And to be clear, you're declining to provide the

N521GRI3

Ferrara - Cross

1 names of the people involved in that scenario you just provided
2 and you're not going to tell us the song.

3 A. I'm sorry. Can you speak closer to the mic.

4 Q. Are you in a position to tell us who you were working for
5 and what song was involved?

6 MS. FARKAS: Objection. Rule 26.

7 THE WITNESS: Right.

8 MR. FRANK: I'll withdraw the question.

9 THE COURT: Well, the question is, is he in the
10 position to, in a sense, substantially what I ruled he could do
11 from his own knowledge. And we will respect it either way.

12 BY MR. FRANK:

13 Q. Are you in a position to identify for whom you were working
14 and what song was involved?

15 A. I would literally have to contact, in this case, that —
16 that company in Nashville and get permission to — to state
17 that. I could not break that confidence.

18 Q. So as you sit here today and testify, you can't provide —
19 you can give us generalizations but you can't provide
20 identification of the specific cases —

21 A. Yeah.

22 Q. — is that fair?

23 MS. FARKAS: Objection. Asked and answered.

24 A. Yeah, I think I have answered the question.

25 Q. Thank you.

N521GRI3

Ferrara - Cross

1 Dr. Ferrara, during your career as a musical —
2 musicologist, rather, have you ever participated in a case
3 where you were accused of being dishonest or failing to
4 exercise candor in the proceedings?

5 MS. FARKAS: Objection, your Honor. If Mr. Frank is
6 going to start venturing into other cases where Dr. Ferrara
7 served as an expert and seek to elicit some sort of — to see
8 whether if any courts have criticized his testimony, countless
9 courts in this circuit, including the Second Circuit, have
10 rejected attempts to cross-examine experts about opinions they
11 provided in other cases and other courts' treatments of their
12 opinions. It's irrelevant, it's utterly unrelated to this
13 case, and it could potentially confuse the jury.

14 MR. FRANK: I think it's absolutely relevant as to
15 credibility, and it doesn't go to his opinions, it goes to —
16 it goes to motions that were filed in the case that I'm about
17 to ask him about, with respect to the methodology employed.

18 THE COURT: Knowing that humanity has its failings and
19 there are examples of overreaching, particularly in the music
20 industry and litigation, I'm going to object to the form of
21 that question. I will allow you to ask him if there was ever
22 an occasion where a court found that he had acted improperly.

23 MR. FRANK: Yes, your Honor.

24 THE COURT: Charges of impropriety are easy to make.

25 MR. FRANK: I understand, your Honor.

N521GRI3

Ferrara - Cross

1 BY MR. FRANK:

2 Q. Dr. Ferrara, you recall testifying in the "Stairway to
3 Heaven" case?

4 A. Yes.

5 Q. I believe it's affectionately referred to sometimes as the
6 *Skidmore* case?

7 A. Yes.

8 Q. Were there any issues adjudicated by the court with regard
9 to conflicts of interest or any other problems?

10 A. I'm very happy you asked that question. Yes, indeed. I
11 was engaged on behalf of Jimmy Page and Robert Plant of Led
12 Zeppelin and Warner Music in that case, and ultimately went to
13 trial.

14 Some years before, I was contacted by Universal Music
15 Group, who had some interest in "Taurus," the plaintiff's song.
16 They called me. I completed an analysis. I can't tell you
17 what that analysis was. It's confidential.

18 About perhaps a year later — I don't know — I
19 received a call from Warner Music asking if I could take a look
20 at this case for them, and I gave them exactly that
21 information. And they said, well, Universal Music is not
22 suing; the estate of the writer is suing, but Universal Music
23 is not suing. So I said, if you want me to — to be a
24 testifying witness in this case, you must get approval from
25 Universal Music Group for me to do that, which they did.

N521GRI3

Ferrara - Cross

1 And the key is now, specifically, the attorney for the
2 plaintiff said that I had broken some kind of rule, federal —
3 Federal Rule 26, by having a conflict of interest in having
4 done an initial analysis and then done a subsequent analysis,
5 even if my findings were the same in both. The district court
6 judge said, nonsense, and dismissed that. The Ninth Circuit
7 three-judge appellate court said, nonsense, and dismissed it.
8 And the *en banc* panel, either nine, ten, or eleven appellate
9 judges, said nonsense, and dismissed that claim.

10 So I'm happy you asked.

11 THE COURT: For the record, the Court of Appeals
12 opinion mentions his testimony in that case.

13 Q. "Ferrara is the go-to expert for major industry players.
14 He gives them the opinions they want." Have you ever heard
15 that before?

16 A. No, I haven't.

17 Q. You don't recall that from the *Skidmore* case?

18 A. No. Are you saying that the attorney for the plaintiff
19 said that?

20 Q. From a pleading in the *Skidmore* case.

21 A. Are you asking — are you saying that the attorney for
22 Skidmore —

23 MS. FARKAS: Objection, your Honor. I think Mr. Frank
24 should not be quoting from advocacy pleadings. I think your
25 Honor had suggested that he stick to actual rulings.

N521GRI3

Ferrara - Cross

1 MR. FRANK: Dr. Ferrara brought up the issue
2 responsive to my question about the conflict of interest. I'm
3 trying to delve into that.

4 THE COURT: The question is bad in form, and the
5 objection is sustained.

6 MR. FRANK: Thank you, your Honor.

7 BY MR. FRANK:

8 Q. Do you agree with that statement, Dr. Ferrara, that you're
9 the go-to guy?

10 MS. FARKAS: The objection was sustained.

11 MR. FRANK: I didn't ask — I asked a new question. I
12 asked him if he had heard that statement and I asked him if he
13 agreed with it.

14 MS. FARKAS: It's the same question, your Honor.

15 THE COURT: Do you have a basis for asking that
16 question, Mr. Frank?

17 MR. FRANK: I do. Because the — I believe it goes to
18 — he spoke, when —

19 THE COURT: Come up and make your offer here at the
20 side.

21 MR. FRANK: Yes, your Honor.

22

23

24

25

N521GRI3

Ferrara - Cross

1 (At the sidebar)

2 THE COURT: When was that statement made and by whom
3 and to whom?

4 MR. FRANK: It was made in a pleading in the *Skidmore*
5 case by the plaintiff, in a motion to disqualify Dr. Ferrara.

6 MS. FARKAS: In a losing motion to disqualify
7 plaintiff.

8 THE COURT: Excuse me?

9 MS. FARKAS: It was in the losing motion to disqualify
10 Dr. Ferrara.

11 THE COURT: The motion which the Court denied.

12 MR. FRANK: I understand that, your Honor, but the
13 problem is that what we have here is that Dr. Ferrara —
14 Ms. Farkas took extensive testimony yesterday from — trying to
15 make the point that Dr. Ferrara is neutral, he has no skin in
16 the game, he is a neutral arbiter of whether it's infringement
17 or not. The fact that they put that there, they placed his
18 neutrality squarely at issue, and we have a right to probe
19 that.

20 THE COURT: And lost.

21 MR. ZAKARIN: And lost. Exactly.

22 MR. FRANK: I've got some more cases where —

23 THE COURT: Well, I want to see a basis for that
24 question.

25 MR. FRANK: I'll withdraw the question. I'll withdraw

N521GRI3

Ferrara - Cross

1 the question.

2 THE COURT: Well, that's up to you.

3 MR. FRANK: I'll withdraw it. Thank you, your Honor.

4 THE COURT: Suit yourself.

5 MR. FRANK: All right. I'll withdraw it.

6 (Continued on next page)

N521GRI3

Ferrara - Cross

(In open court)

BY MR. FRANK:

Q. Dr. Ferrara, you indicated in your preliminary testimony that you're a full-time professor at NYU?

A. I'm on the full-time faculty, that's correct.

Q. Could you — is there a distinction between being full time versus being full-time faculty?

A. No.

Q. So do you work the same amount of hours, same case — I guess the same class load?

A. Yes. The standard class load for a full professor is two classes per semester; in addition, student advisement, thesis advisement. There are sitting on faculty committees. For example, there is a merit review of all tenured faculty, a large committee that takes quite a bit of time that I sit on, and there is the important promotion and tenure committee, and we talked a little bit about that with respect to someone moving from associate to full or assistant to associate. I sit on those committees and — and work through those assessments of applicants for promotion and tenure.

Q. How much of your annual income would you say is attributable to this kind of work you do, working on cases?

A. I would say that it's about 60 percent, particularly when — when there's a trial. I mentioned in my direct that over 30 years, this is probably the 10th trial, so on average, around a

N521GRI3

Ferrara - Cross

1 trial every three years.

2 Q. All right. But preceding the trials, would it be fair to
3 say that there is quite a bit of prep work, depositions,
4 reviewing materials, coordinating with counsel, and presumably
5 you bill for all of that?

6 A. Yes, of course.

7 Q. Can you tell us when you were initially engaged in
8 connection with this case.

9 A. To the best of my recollection, it was in 2015.

10 Q. So eight years ago.

11 A. Yes.

12 Q. And what were you initially asked to do?

13 A. Initially, I was sent sound recordings by Sony of the two
14 works at issue and asked to complete an analysis.

15 Q. Okay. So is it Sony that actually engaged you in
16 connection with this case?

17 A. To the best of my recollection. It's been eight years, but
18 I believe it was Sony. It could — I could be wrong.

19 Q. Well, presumably in the last couple months in the lead-up
20 to trial, you've been giving bills to someone, correct?

21 A. Oh, yes.

22 Q. And who are you giving the bills to?

23 A. Bills to —

24 Q. Your invoices for your time.

25 A. Invoices. I'm trying to think whether they go to Pryor

N521GRI3

Ferrara - Cross

1 Cashman, the attorneys, or to — to the Ed Sheeran management
2 in the UK. Probably the latter, to Ed Sheeran management.

3 Q. Well, presumably you've received a check responsive to
4 those invoices a couple times; is that fair?

5 A. Yeah. As a bank wire, but yes.

6 Q. And who has cut the checks to you?

7 A. Again, to the best of my recollection, it would be the
8 company that manages Ed Sheeran. I don't recall the name of
9 that company.

10 Q. So it's Ed Sheeran's management company that's been paying
11 you since 2015?

12 A. Oh, no, no. That — you — you had shifted to —

13 Q. Oh, okay.

14 A. — to, you know, deposition — not deposition — to getting
15 ready for trial. So no. Back in 2015, I think it was Sony. I
16 don't remember explicitly. But I would have been billed — I
17 would have billed Sony if that is the case and Sony would have
18 paid my fee.

19 Q. Okay. And this would have been I guess attributable to
20 when the case was still in a presuit posture.

21 A. That's right.

22 Q. And you would have been giving an advisory opinion to Sony
23 at that time.

24 A. That's correct.

25 Q. If you were to aggregate all of the money that you've

N521GRI3

Ferrara - Cross

1 received since you were hired by Sony in 2015 through the
2 present, how much have you been paid to provide services on
3 this case?

4 A. I don't think I can even find all of that information over
5 the last eight years, so I really don't know the answer to
6 that.

7 Q. You have no idea how much you've been paid by the
8 defendants in this case?

9 A. No, I don't.

10 Q. Could you give us a proffer, a ballpark figure. Is it a
11 hundred thousand, 200,000? Do you have a range?

12 A. It could — it would certainly — let me put it this way.
13 It would certainly be 100,000 since 2015, but one of the
14 reasons is because of the reports that went back and forth
15 initially that were pre the order by Judge Stanton about the
16 deposit copy; and then in particularly the last four months and
17 in the last few weeks, the plaintiffs, to be quite candid, have
18 changed so many things and have caused me, therefore, to change
19 what I'm doing, for example, in the selection in arrangement —

20 Q. Excuse me. I asked you how much —

21 A. Well, I'm giving you —

22 Q. — how much you've been paid. How much have you been paid?
23 Do you have an answer to that or not?

24 MS. FARKAS: I think he's answering your question, if
25 you let him answer the question, please.

N521GRI3

Ferrara - Cross

1 MR. FRANK: It's a numerical figure we're trying to
2 identify, not the back story.

3 MS. FARKAS: You asked him how much, he said he
4 couldn't remember, and then you tried to ask him how he can
5 remember, and he's going through in his head how he can
6 remember how much he billed.

7 MR. FRANK: He's using it as a subterfuge to criticize
8 the plaintiff's expert, and I'd appreciate he wait until he's
9 redirected before he does that. We just want to know how much
10 money he's been paid, if he does.

11 THE WITNESS: I've already answered that.

12 MR. FRANK: You have to wait for the judge's ruling.

13 THE WITNESS: Oh, I'm sorry.

14 THE COURT: He answered that he couldn't; he didn't
15 have the figure.

16 MR. FRANK: Fair enough. Thank you.

17 BY MR. FRANK:

18 Q. Dr. Ferrara, have you ever been engaged by this particular
19 law firm that's defending Mr. Sheeran?

20 A. I haven't been engaged by the law firm, but I have been
21 engaged by clients of the law firm. So I — in other words, I
22 have done other litigation issues with Pryor Cashman.

23 Q. Do you have a recollection as you sit here today as to how
24 many times you've worked with Pryor Cashman?

25 A. Over the last few years that I can certainly remember,

N521GRI3

Ferrara - Cross

1 probably three times outside of this case. It's hard for me to
2 say.

3 Q. And that was always for defendants, correct?

4 A. Yes.

5 Q. Have you ever done any work outside of this particular song
6 on behalf of Ed Sheeran?

7 MS. FARKAS: Objection, your Honor. This is getting
8 — anything outside of this litigation and this case I think is
9 dancing very close to violating your Honor's order.

10 MR. FRANK: I didn't say anything about cases. I
11 asked if he did some work, and we could certainly exclude
12 litigation issues.

13 MS. FARKAS: It's the same objection, your Honor.
14 It's irrelevant.

15 THE COURT: Let me see my order.

16 MR. FRANK: I think that was the order on No. 3, your
17 Honor.

18 THE COURT: I've got it here.

19 I'll read you the order so we all know what it says.

20 MR. FRANK: Yes, your Honor, I would appreciate that.

21 THE COURT: Because I know you're very desirous of not
22 violating it.

23 MR. FRANK: Yes, your Honor.

24 THE COURT: This was entered on October 5, 2020.

25 "There shall be no reference, mention, evidence, or argument

N521GRI3

Ferrara - Cross

1 concerning any other litigation or claim of infringement
2 between the parties or any other parties and any defendant, or
3 the outcome of any such claim. The trial shall be devoted
4 entirely to the facts and law involved in this case, and any
5 reference to other claims, copying, infringements, or
6 litigations are excluded under Federal Rule of Evidence 403 and
7 404."

8 MR. FRANK: Thank you, your Honor.

9 THE COURT: That order is still in effect, and I think
10 it's clear.

11 MR. FRANK: Thank you, your Honor. I'll move on to
12 the next question.

13 THE COURT: Be my guest.

14 MR. FRANK: Thank you.

15 BY MR. FRANK:

16 Q. Have you ever been on the opposite sides of Dr. Stewart in
17 a case where he represented one side's interest and you worked
18 on the other side?

19 A. Yes.

20 Q. Okay. Can you tell us the times that you did that.

21 A. Well, the Led Zeppelin case, Dr. Stewart was the defendant
22 — was the plaintiff's musicologist.

23 Let's see. A little more recently —

24 THE COURT: And in fairness to my remarks that the
25 Court of Appeals referred to Dr. Ferrara, they also referred to

N521GRI3

Ferrara - Cross

1 Dr. Stewart.

2 MR. FRANK: Oh, great. Thank you, your Honor.

3 A. There's another case, *Smith v. The Weeknd* — that's not Sam
4 Smith, this is a different Smith, and The Weeknd was the
5 defendant, or a part of defendants. Dr. Stewart worked on
6 behalf of Smith, I worked on behalf of The Weeknd. And so that
7 case was dismissed. In fact, Dr. Stewart's report was
8 excluded. It's in the decision.

9 I know there's —

10 Q. What about a case in which you represented Mark Ronson in
11 connection with "Uptown Funk"?

12 A. Oh, yes.

13 Q. You were an expert for the defendant, Mark Ronson, were you
14 not?

15 A. Yeah. That never — I don't think we even had depositions
16 in that — in that case.

17 Q. This case was settled, was it not?

18 A. It was settled, yes.

19 Q. Didn't you also provide consulting services for Justin
20 Bieber and Dan + Shay in connection with a case called — I
21 think it's a song called "10 Hours"? Or was it — does that
22 sound familiar to you?

23 A. Yeah. That was recent, and I was not heavily involved in
24 that case, but, yeah, I've done other cases for Justin Bieber.

25 Q. Dr. Stewart was the opposing expert, was he not?

N521GRI3

1 A. Actually, I don't even know that. I don't think I ever saw
2 any report from the other side. Again, I — there was very
3 little work that I did in that case.

4 Q. Thank you, Dr. Ferrara.

5 A. It's my pleasure.

6 MR. FRANK: Your Honor, I've been advised that we are
7 getting close to the proverbial witching hour and that this
8 might be a good point to stop, if the Court is so inclined.

9 THE COURT: We'll resume at the usual time tomorrow
10 morning.

11 I promised during your selection that I would keep you
12 posted, and — can you hear me now? Is this better?

13 JUROR: Yes. Thank you.

14 THE COURT: Thank you for — that I would keep you
15 posted. And it's my impression that the case is growing
16 towards the end and I expect it to close up within the next
17 couple of days.

18 Does any counsel differ?

19 MR. FRANK: Your Honor, if I may --

20 THE COURT: I'm not an expert on these things.

21 MR. FRANK: And I would invite Ms. Farkas to tell me
22 if I'm wrong, but it's my understanding that after this
23 witness, the defendants are going to be resting. Is that
24 correct?

25 MS. FARKAS: That's correct, your Honor.

N521GRI3

1 THE COURT: After they rest, the remaining work is
2 closing arguments and charge, and before the closing arguments
3 are held, I go over the charge with counsel so there are no
4 surprises and they know what I'm going to charge and can
5 address you accordingly. And normally that takes maybe a
6 couple of hours on some day, and either later that day or early
7 the next, the opening of the next morning, there will be the
8 closing arguments and charge. The charge doesn't last terribly
9 long — half an hour, perhaps; perhaps less. And then you have
10 the case to decide.

11 So that's the remaining work to be done after the
12 closing. And I would think — well, it depends on the length
13 of the cross-examination, for one thing. That means it will be
14 in your hands probably tomorrow or the next day.

15 See you tomorrow.

16 (Adjourned to May 3, 2023, at 11:00 a.m.)
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9
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11
12
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17
18
19
20
21
22
23
24
25

INDEX OF EXAMINATION

Examination of:	Page
LAWRENCE FERRARA PhD	
Direct By Ms. Farkas	666
Cross By Mr. Frank	773

DEFENDANT EXHIBITS

Exhibit No.	Received
210	678
201	680
202	682
203	684
204	694
212	697
214	701
238	708
213A and 213B	761